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Supreme Court, U.S.
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No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JULIE MIRON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LAURENCE H. TRIBE
Counsel of Record
BRIAN STUART KOUKOUTCHOS
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

ANDREW M. LAWLER
SHARON D. FELDMAN
ANDREW M. LAWLER, P.C.
220 East 42nd Street
New York, New York 10017

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

I. May the Fifth Amendment, which states that a person cannot "be compelled in any criminal case to be a witness against himself," be read to mean that a person *may* in fact be so compelled — as long as, in hindsight, he does not prove to have been a *key* witness?

II. When the government induces a witness to testify by guaranteeing that none of his testimony will be used "directly or indirectly" against him and then admittedly breaks that promise by using that immunized testimony in obtaining all of the evidence actually used against him at trial, may the resulting conviction nonetheless be affirmed?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit is reported at 859 F.2d 1078 and reprinted as Appendix A. (A1).[1] The decision of the United States District Court for the Eastern District of New York is reported at 671 F.Supp. 124 and reprinted as Appendix B. (A37).

JURISDICTION

The decision of the Court of Appeals was entered on September 22, 1988. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on November 21, 1988. (A68). On December 13, 1988, the Circuit Justice for the Second Circuit extended the time within which to file this petition to February 10, 1989. (A70). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

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[1] References to the appendices will be styled "A _____". References to the district court transcript included in the appendix prepared for the Second Circuit will be styled "CA _____".

18 U.S.C. § 6002 provides in relevant part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to . . . a court or grand jury of the United States . . . and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . .

STATEMENT OF THE CASE

A. Introduction

Over the strong dissent of Judge Altimari, the Second Circuit has held that an admitted violation of the Compulsory Self-Incrimination Clause of the Fifth Amendment may be excused, and the resulting conviction affirmed, on the theory that the prosecution's indisputably impermissible use of the witness' compelled, immunized testimony proved in hindsight to be unnecessary to his conviction. The fact that this testimony was employed to obtain a wiretap order that produced literally all of the evidence used to convict the witness did not deter the Second Circuit from this conclusion. Because the affidavit that the prosecution used to obtain the wiretap order contained ample information *in addition* to the immunized testimony impermissibly related therein, the Second Circuit held that the violation of the immunity promise and of the Fifth Amendment privilege made too little difference to warrant reversing the resulting conviction.

Perhaps the easiest way to underscore the magnitude of the conflict between that holding and the Fifth Amendment precedents of this Court and of other circuits would be to ask how acceptance of the Second Circuit's decision would alter the terrain on which one of the most closely watched legal battles of the day is being waged. As this petition is being filed, the United States District Court for the District of Columbia continues its long struggle over how to proceed in the trial of *United States* v. *North*, Crim. No. 88-0080-02 (GAG), so as to respect in full the grant of immunity under which Oliver North was compelled to testify before Congress in 1987. The premise under which that court is operating is that *none* of the government's evidence may derive, *even in part*, from that compelled testimony. Matters would certainly be simplified for the prosecution in that case if it were instead understood that evidence traceable to Lt.Col. North's compelled, immunized testimony may be used so long as it does not prove crucial or decisive to the government's case, or that evidence traceable in part to that compelled testimony may be regarded as untainted as long as the official authorization for the evidence in question — whether a subpoena or a search warrant or a surveillance order — although predicated in part on the compelled testimony, would in retrospect have been issued even if the compelled testimony had not been used. Such understandings would make life a good deal easier for the independent counsel — but would come as quite a shock to those concerned with preserving intact the Fifth Amendment privilege against compelled self-incrimination.

B. Statement of Facts

As the court below recognized, this case "raises in stark form" the question of whether a defendant's conviction may be affirmed "where his Fifth Amendment rights have been violated by the inadvertent inclusion of prior immunized tes-

timony in an application for electronic surveillance that led to evidence of his criminality." (A2). In 1980, defendant Miron, then a 67-year-old businessman and the head of several New York construction supply companies, testified before a grand jury investigating suspected racketeering by union official John Cody and members of organized crime. Miron testified about the relationship between Cody and Paul Castellano, the reputed head of the Gambino crime family, and about Miron's own ties to both men. To obtain this testimony, the government overcame defendant's Fifth Amendment objection by promising, pursuant to the use-immunity statute, 18 U.S.C. § 6002, that none of his testimony or any information directly or indirectly derived therefrom would be used against him in any way. (A2-A3). The government has never alleged that Miron's testimony was anything less than completely truthful and forthcoming.

Cody was convicted of labor racketeering in 1982. (A3).[2] The government's investigation then focused on the home of Paul Castellano and the government obtained authorization for the placement of electronic bugs. When conversations intercepted by this wiretap indicated the possibility that labor racketeering was being discussed at the residence, the government sought a court order expanding the wiretap to cover that substantive offense. (A3). There is no dispute that ¶18 of the government's wiretap affidavit directly referred to and summarized part of Miron's immunized testimony in order to establish the connection between Castellano, labor officials, and construction contractors. (A4). To further establish a relationship between crime boss Castellano and labor boss Cody, other parts of the affidavit cited two documents related to Cody's

[2] Although Miron did not testify at Cody's trial, the district court found that his testimony was used in preparing the government's sentencing memorandum on Cody and to corroborate other information provided by FBI informants about the Cody-Castellano relationship. (A39); (A3).

sentencing, the probation report and the government's sentencing memorandum (¶¶15-17, A42-43); (CA199-200), which in turn relied upon Miron's testimony. (A39); (CA326-33). Subsequent paragraphs reported visual surveillance of Miron at the Castellano home and noted that the government had intercepted conversations in which he was overheard. (A4); (¶¶31(g), 31(o), 34, A45-47). These paragraphs referred back to ¶ 18, which specifically incorporated Miron's testimony linking Castellano to Cody. (A45). The FBI agent who prepared the affidavit acknowledged that these references to and sightings of Miron helped establish probable cause that labor racketeering was being discussed at the Castellano residence *only* in light of Miron's immunized testimony. (CA305). In fact, the district court specifically found that, but for Miron's grand jury testimony, "it is very highly doubtful" that his name would have appeared in the affidavit at all. (CA359).

Judge Bramwell approved the wiretap application on the basis of the FBI affidavit, and the bug soon produced evidence against Miron that the district court (Weinstein, J.) described as "devastatingly incriminatory." (A49). There is no dispute that the entire basis of Miron's conviction on RICO, labor racketeering, and related charges was the evidence gathered through the bugging of the Castellano residence. (A5-6).[3] Thus there is no dispute that Miron was compelled by the grant of immunity "to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in a chain' of evidence tending to establish his guilt." *Marchetti* v. *United States*, 390 U.S. 39, 48 (1968). As the record shows, the defendant testified about his relationships with Cody (the subsequently convicted labor leader) and Castellano (the reputed

[3] As Judge Weinstein advised the prosecution on the day before it rested its case at trial, "unless you make the case on the bugs, you don't have a case." (Trial Transcript at 550).

head of the Gambino crime family) and about meetings with those parties relating to construction disputes; this immunized testimony was then used by the government in its wiretap affidavit to demonstrate that such meetings occurred, as part of its effort to establish probable cause that labor racketeering was being discussed at the Castellano residence; information garnered from that electronic surveillance in turn led to an indictment under the RICO statute charging defendant Miron with being an "associate" of the Gambino crime family and, as such, with having conspired to participate in its affairs through a pattern of labor racketeering.

C. Proceedings Below

Prior to trial, Miron objected to the use of his immunized testimony and moved that the evidence from the bugs be suppressed and that the indictment be dismissed. The district court found that the government's disclosure of the grand jury testimony to FBI investigators without a court order violated Fed.R.Crim.P. 6(e). (CA358-59).[4] The court also acknowledged "an absolute prohibition" on the government's use, in the application for electronic surveillance, of the immunized testimony, and stated that the government "shouldn't have done it." (CA262). The court then found that it was "clearly a violation of the immunity granted to use this material" (CA376): "If you immunized the man, then you use his immunized testimony to get a wiretap improperly, then the information you get from that wiretap is not usable." (CA382). The witness must "get[] exactly what he bargained for. You can't use his testimony directly or indirectly for any purpose." (CA381-82). Nevertheless, the district court concluded that

[4] The court found it "certainly clear that a revelation . . . to [the FBI] to be used in obtaining an extension of the bug authorization[,] particularly when that ultimately might be used against Mr. Miron, . . . is highly suspect." (CA359).

the effect of the government's action was "de minimis," on the ground that the immunized testimony and derivative information used in the affidavit "was unnecessary" to the court's decision — the surveillance warrant "would have been granted without this information." (CA260-62); (A67); (A5). Miron was convicted of labor racketeering and sentenced to five years in prison.

The Court of Appeals for the Second Circuit affirmed. The court ruled that "the use of Miron's immunized testimony violated the use-immunity statute and the Fifth Amendment." (A8). (*See also* A29) (Altimari, J., dissenting).[5] But the Second Circuit held, over the vigorous dissent of Judge Altimari, that this violation could be deemed harmless because the tainted surveillance affidavit also included enough additional independent information to justify the wiretap warrant.[6] The Court of

[5] The government argued below that, "because the crimes committed by Miron occurred after he gave his immunized testimony, the use of that testimony in securing the indictment and his conviction violates neither [§ 6002] nor the Fifth Amendment." (A6-7). Although Judge Van Graafeiland accepted this argument in his concurring opinion (A23-24), the contrary holding of Judge Winter and Judge Altimari is clearly correct. As Judge Winter explained, Miron's testimony about his dealings with corrupt labor bosses and reputed crime lords disclosed "'links in a chain of evidence' that were potentially incriminating both as to past and future crimes arising out of the activity being investigated. The very use of Miron's immunized testimony in the application for an extension and expansion of the surveillance authorization demonstrates the testimony's inculpatory nature." (A8) (citing *Marchetti* v. *United States*, 390 U.S. 39, 48 (1968)); (*see also* A33 & n.1) (Altimari, J., dissenting). The labor racketeering of which Miron was convicted was part of a continuing course of criminal conduct (A8); (*id.* at A33 n.1) (Altimari, J., dissenting); *see United States* v. *Apfelbaum*, 445 U.S. 115, 129 (1980), and, as Judge Altimari observed, "[a]lthough few things about RICO are clear, the statute surely is one aimed at continuing criminal conduct. *See Sedima* v. *Imrex Co.*, 473 U.S. 479, 496 n.14 (1985)." (A34 n.1). The argument advanced by Judge Van Graafeiland therefore does not constitute an alternative ground for upholding the judgment below.

[6] Judge Altimari noted that "[n]either the Supreme Court nor [the Second Circuit], until now, has ever held that the harmless error rule applies when, as in this case, there is a violation of the privilege against self-incrimination." (A34-35). He added that "it is difficult to understand how the government's error in this case can be deemed harmless when in fact all of the 'devastatingly incriminatory' evidence offered against Miron at trial was derived from the unlawful use of his immunized testimony." (A35).

Appeals reasoned that the use of Miron's testimony to establish a link between Castellano and Miron's own ties to labor bosses "was of negligible significance . . . in light of independent evidence that, after the grand jury testimony, Miron's cars were seen at Castellano's home and that Miron used a code name in a phone call to arrange a meeting with Castellano." (A9). The court below repeatedly emphasized this evidence (A9, A11), although its conclusion that this evidence was "independent" of Miron's testimony is contradicted not only by the district court's own analysis of the evidence, *see* p. 5, *supra*, but also by the FBI affidavit itself, which expressly referred to Miron's immunized testimony in order to explain the significance of these supposedly "independent" observations. (A45, ¶31(g)). In any event, it was sufficient for the Second Circuit that the district court found that the government would have applied for and Judge Bramwell would have issued the warrant even without the inclusion of Miron's immunized testimony. (A8-9).[7]

The Court of Appeals held that the rule of *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972), that evidence introduced by the government must be derived from legitimate sources wholly independent of compelled testimony, was satisfied in this case (A10-11), even though *all* the evidence used against Miron at trial admittedly came from the tainted surveillance application.[8] Admission of the wiretap evidence against Miron

[7] This petition for certiorari assumes the correctness of the district court's factual findings and is not in any way predicated on the possibility that they are incorrect. But an argument that the findings are indeed clearly erroneous would fall within the scope of the Questions Presented if certiorari were granted.

[8] Judge Altimari dissented, arguing that § 6002 and the Fifth Amendment "required the government to demonstrate that *all* the evidence it offered against Miron at trial was 'derived from legitimate independent sources, *see Kastigar*, 406 U.S. at 461-62 . . . This the government could not do since practically all the evidence offered against defendant was derived from the FBI agent's affidavit including the reference to Miron's immunized testimony." (A34) (original emphasis).

was supported, according to the court below (A12), by the Fourth Amendment independent source rule as explained in *Murray* v. *United States*, 108 S.Ct. 2529 (1988), even though *Murray* held that evidence obtained through a search warrant was admissible only if no observation or other knowledge gleaned from a prior, illegal search was in fact used in the warrant application to the judge — a condition admittedly absent here. In excusing the government's conceded breach of its immunity promise to Miron, Judge Winter made no attempt to distinguish *Santobello* v. *New York*, 404 U.S. 257 (1971), in which this Court, as a matter of due process, rejected the precise harmless error argument accepted by the court below. (A12-13). Judge Van Graafeiland acknowledged defendant's reliance on *Santobello* but concluded, in disagreement with the holdings of other circuits, that *Santobello's* analysis of the due process restraints governing agreements between prosecutors and defendants simply does not apply to an agreement exchanging immunity for testimony. (A25). In dissent, Judge Altimari relied on *Santobello* and warned that if "the government is allowed to violate the 'bargain' by using immunized testimony — no matter how innocent, inadvertent or unwitting that use might be — . . . witnesses granted 'use' immunity in the future will think twice about testifying truthfully (or at all) rather than run the risk that the government will later be able to use the 'immunized' testimony against them." (A36).

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S HOLDING AUTHORIZING PROSECUTORIAL USE OF COMPELLED TESTIMONY VIOLATES THE "USE IMMUNITY" RULE OF *KASTIGAR* v. *UNITED STATES*, PERVERTS THE "INDEPENDENT SOURCE" RULE OF *MURRAY* v. *UNITED STATES*, AND EXTENDS THE "HARMLESS ERROR" RULE TO GOVERNMENT USE OF COERCED STATEMENTS, IN DEFIANCE OF *NEW JERSEY* v. *PORTASH* AND *MINCEY* v. *ARIZONA*.

A. The Government Made Impermissible Use of Defendant's Immunized Testimony to Obtain All of the Evidence It Used to Prosecute Him.

The court below *concedes* that "the use of Miron's immunized testimony violated the use-immunity statute and the Fifth Amendment." (A8). (*See also id.* at A33-34) (Altimari, J., dissenting). The use of that compelled testimony might be said not to have forced Miron to be a "witness against himself" at his criminal trial if the investigatory use of his immunized testimony had led nowhere. But the electronic surveillance application in which Miron's coerced statements were used was anything but an investigatory dead end. Indeed, it is undisputed that the surveillance authorized pursuant to that application garnered not some but *all* of the evidence that ultimately convicted the defendant. (A5-6). (*See also id.* at A35) (Altimari, J., dissenting). Nor was there any independent source for *any* of the evidence obtained from that wiretap; it is undisputed that there was no other wiretap order untainted by the inclusion of immunized testimony, and no parallel or other investigation that turned up or would have turned up the same or similar evidence. That should have ended the matter and

required reversal of defendant's conviction under the authority of *Kastigar* v. *United States*, 406 U.S. 441 (1972).

B. EACH OF THE SECOND CIRCUIT'S ATTEMPTS TO EVADE *KASTIGAR'S* FLAT BAN ON THE USE OF IMMUNIZED TESTIMONY FAILS, AND CONSTITUTES AN INDEPENDENT GROUND FOR GRANTING CERTIORARI.

1. Certiorari is warranted to contain the perversion of the independent source rule wrought by the Second Circuit's misunderstanding of *Murray* v. *United States*.

The majority of the Court of Appeals sought to avoid that obvious conclusion by equating evidence garnered through an "independently obtained search warrant," *Murray* v. *United States*, 108 S.Ct. 2529, 2532 (1988) — of which it admits there is *none* in this case — with evidence garnered through a tainted search warrant that the court concludes after the fact *could* have been, but was not, independently obtained. But the independent source exception to the Fourth Amendment exclusionary rule — even if it were to be applied to excuse government misuse of coerced, self-incriminating statements[9] — simply has no application here, since it allows the admission of evidence only if it "has been discovered by means wholly independent of any constitutional violation." *Nix* v. *Williams*, 467 U.S. 431, 443 (1984).

Thus the decision below is undermined and not, as the Court of Appeals believes, "bolstered by the recent decision in *Murray*

[9] As Judge Altimari noted in dissent, even the majority below conceded that cases such as *Murray*, dealing with the limits of the Fourth Amendment exclusionary rule, are "of limited relevance in the Fifth Amendment context," because the Fifth Amendment " 'is *by its terms* an exclusionary rule.' " (A35) (Altimari, J., dissenting) (original emphasis) (quoting *United States* v. *Kurzer*, 534 F.2d 511, 516 (2d Cir. 1976)). *See also* note 13, *infra*.

v. *United States*." (A12). *Murray* held evidence from a search pursuant to a warrant admissible only where no observation or other knowledge gleaned from a prior, illegal search was in fact used in the warrant application to the judge. 108 S.Ct. at 2532. The *Murray* Court expressly noted that no "genuinely independent source" would exist if information from the illegal search had been "presented to the Magistrate" in the application for the subsequent search warrant.[10] The hypothetical that *Murray* distinguished *is this case*: the Second Circuit concedes and the government itself admits that the government *did* use Miron's coerced testimony in its warrant application to the judge. Even under the rule of *Murray*, therefore, the resulting wiretap authorization order and all the evidence obtained through it are tainted.

The incentive for government misconduct which so concerned the dissenters in *Murray*, 108 S.Ct. at 2538-39 (Marshall, J., joined by Stevens and O'Connor, JJ., dissenting); *id.* at 2540 (Stevens, J., dissenting), is present in this case even by the looser standards of the *Murray* majority. Under the rule announced below, the government would routinely have every incentive to use a witness' immunized testimony against him. If the government had plenty of other information to support its wiretap and search warrant applications or its indictment, the immunized testimony might just as well be included since that violation of immunity would probably be

[10] Likewise, it was crucial to the decision in *Segura* v. *United States*, 468 U.S. 796 (1984), that "*none* of the information on which the warrant was secured was derived from or related in any way to the initial [illegal] entry into [the defendant's] apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed *or used* by the agents to secure the warrant." *Id.* at 814 (emphasis added). *See also Murray*, 108 S.Ct. at 2533 (warrant in *Segura* was "valid and untainted" by any use of illegally-obtained information); *id.* at 2540 (Marshall, J., joined by Stevens and O'Connor, JJ., dissenting) (evidence obtained by search warrant in *Segura* was admissible only because "no information from an illegal search was used in [the] subsequent warrant application").

excused, as it was below, as insignificant. Alternatively, if the government believed it needed the immunized testimony to make a convincing case for tapping the witness' phone or for convicting him before a jury, then the prudent course would again be to violate immunity: if the case would fail without the immunized testimony, then there would be nothing to lose and a lot to gain by including it, since the government would still have a chance to convince a court, after the fact, that the testimony was not really very important to the judge's or the jury's decision. If this perverse incentive structure is to be avoided, certiorari should be granted and the line excluding illegally-obtained information should be drawn for Fifth Amendment purposes, as it was in *Murray* for purposes of the Fourth Amendment, to bar the admission of evidence obtained with a warrant application that *itself* contained information used in admitted violation of the Fifth Amendment.

2. Certiorari is warranted to review the Second Circuit's unprecedented extension of the harmless error rule to government use of *coerced statements*, in defiance of the Fifth Amendment's text and of this Court's precedents.

Since the government conceded that it used Miron's immunized testimony in obtaining the crucial wiretap warrant, the court below could not and did not rule that, as the Fifth Amendment requires, the evidence used against Miron, an immunized witness, "derived from a legitimate source wholly independent of the compelled testimony." *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972). As Judge Altimari wrote in dissent, "it is difficult to understand how the government's error in this case can be deemed harmless when in fact all of the 'devastatingly incriminatory' evidence offered against Miron at trial was derived from the unlawful use of his immunized testimony." (A35). Nevertheless, the Second Circuit

reasoned that, because the wiretap would have been authorized by a court on the basis of the other, untainted information in the affidavit even if the immunized testimony had been excised, the defendant is entitled to no remedy for the violation of his rights (A8-12), inasmuch as the defendant's coerced testimony did not prove decisive in the authorization of the fatal wiretap. Because the case for authorizing the wiretap "was not . . . borderline," (A11), we are told, the Fifth Amendment violation was "of negligible significance" and may now be ignored. (A9).

This reasoning is utterly at odds with the text of the Fifth Amendment, which declares in the plainest terms possible that a person cannot "be compelled in any criminal case to be a witness against himself," not that a person *can* be thus compelled as long as, in retrospect, he does not prove to have been a *key* witness. The Fifth Amendment forbids self-*incrimination*, not merely self-*conviction*. The misuse of coerced testimony does not have to be decisive — to tip the scales in the judge's or jury's mind — for the conviction to violate the constitutional privilege. "The protection does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution . . . ." *Maness* v. *Meyers*, 419 U.S. 449, 461 (1975). And there is simply no dispute that Miron's immunized testimony furnished just such a link — that is precisely why the government included it in the wiretap application.[11]

[11] The majority below conceded that "[t]he very use of Miron's immunized testimony in the application for an extension and expansion of the surveillance authorization demonstrates the testimony's inculpatory nature." (A8). (*See also id.* at A31) (Altimari, J., dissenting) ("To establish the connection between Castellano, labor officials and construction company contractors, the FBI . . . *directly* referred to Miron's grand jury testimony indicating that Castellano, [labor boss] Cody and Miron met to work out prices for building materials.") (original emphasis).

The Second Circuit's decision to allow the defendant's coerced statements to be used against him on the ground that those statements could be deemed surplusage finds no support in § 6002. The use-immunity statute contains no exception for supposedly surplus or gratuitous prosecutorial use. Section 6002 "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect," *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972) (original emphasis). "This *total prohibition on use* provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." *Id.* at 460 (emphasis added).

The judgment below is therefore in direct conflict with controlling decisions of this Court. As Judge Altimari noted in his dissent below, the harmless error rule announced in *Chapman* v. *California*, 386 U.S. 18 (1967), has *never* been applied by this Court to excuse prosecutorial use of coerced incriminating statements in violation of the Fifth Amendment. (A34-35). Indeed, this Court has repeatedly recognized that the presence of ample untainted evidence is simply irrelevant in such cases: "*Any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law 'even though there is ample evidence aside from the [coerced statement] to support the conviction.' " *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) (original emphasis) (citation omitted) (Stewart, J., for the Court, joined by Burger, C.J., and Brennan, White, Marshall, Blackmun, Powell and Stevens, JJ.). *See also Chapman* v. *California*, 386 U.S. at 23 & n.8; *Payne* v. *Arkansas*, 356 U.S. 560, 568 (1958). This rule applies with full force to bar use of immunized testimony, because "[t]estimony given in response to a grant of . . . immunity is the essence of coerced testimony." *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979) (Stewart, J., for the Court, joined by Brennan, White, Marshall,

Powell, Rehnquist and Stevens, JJ.). *Portash* accordingly held that the government's mere *threat* to use the defendant's prior immunized testimony to impeach him during trial violated the Fifth Amendment and required reversal of his conviction. In so holding, the Court did not ask whether any other factors contributed to the defendant's decision not to testify in his own behalf. Nor did the Court ask whether there was ample evidence for the jury to have convicted the defendant even if he had taken the stand to defend himself. Because he was prosecuted in part with the use of his immunized testimony — indeed, with its merely threatened use — his conviction could not stand.[12]

No balancing of interests is appropriate in a case like *Portash* or this one because these cases do not involve the sort of exclusionary rule triggered by a Fourth Amendment violation or by a failure to provide the warning mandated by *Miranda*

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[12] The panel majority cited several cases to support its proposition that unlawful use of compelled testimony is subject to a harmless error rule. (A10). (*See also id.* at A26) (Van Graafeiland, J., concurring). *See, e.g.*, *United States* v. *Nemes*, 555 F.2d 51, 55 (2d Cir. 1977); *United States* v. *Shelton*, 669 F.2d 446, 461-64 (7th Cir.), *cert. denied*, 456 U.S. 934 (1982); *United States* v. *Gregory*, 730 F.2d 692, 698 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 1170 (1985); *United States* v. *Byrd*, 765 F.2d 1524, 1529 n.8 (11th Cir. 1985); *United States* v. *Beery*, 678 F.2d 856, 863 (10th Cir. 1982), *cert. denied*, 471 U.S. 1066 (1985). This reliance is demonstrably misplaced. The wholly gratuitous mention in some of those cases of the application of the harmless error rule was mere dictum founded on a line of careless citations ultimately leading to a case that once again supports the defendant. With respect to "harmless error" dicta, *Byrd* cites *Gregory*, which cites *Beery*, which cites *Nemes*, and *Nemes* — which made no mention of a harmless error rule — focused on whether *any* compelled testimony had been used and held that such use against the defendant would have required dismissal of the indictment. 555 F.2d at 54 n.3. The harmless error dictum in *Shelton* is equally unpersuasive, for the court in that case found that the government had in fact met its burden "of showing that it did not directly or indirectly use any of [the defendant's] immunized testimony." 669 F.2d at 463. Although government officials had access to the testimony, there was no evidence that they had used it, and there was even some doubt that the testimony had in fact been immunized. *Id.* at 463-64. The harmless error rule crafted by the court below is therefore wholly unprecedented.

v. *Arizona*, 384 U.S. 436 (1966). A "defendant's compelled statements, as opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use whatever against him," *Portash*, 440 U.S. at 459. "Here . . . we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible." *Id.*

The reason is that the exclusion of immunized testimony, unlike the exclusion of evidence obtained in violation of the Fourth Amendment or the exclusion of testimony obtained without *Miranda* warnings, is not simply a necessary evil, a measure of desperation born of the failure of other devices to discourage such government conduct. Immunity from use of compelled testimony is occasioned not by a constable's blunder, but by a considered, deliberate law enforcement decision, made at the highest levels of the Department of Justice, that the public interest in finding out what the witness knows is greater than the interest in convicting him of a crime with the aid of what he says. With a grant of immunity, the executive branch of government, supervised by the judiciary, formally confronts the witness and legally removes his Fifth Amendment right, forbidding him under pain of contempt from thereafter asserting the privilege. If a right is thus to be deliberately removed by the state, the Constitution will not tolerate uncertainty about the adequacy of the compensating immunity. Unlike the Fourth Amendment, the Fifth Amendment "is by its terms an exclusionary rule." *United States* v. *Kurzer*, 534 F.2d 511, 516 (2d. Cir. 1976).[13] The judgment below ignores this

[13] Under the Fourth Amendment, the essence of the constitutional wrong lies in the initial invasion of person or property. The Fourth Amendment exclusionary rule was conceived as a means of deterring such invasions. *Cf. Segura* v. *United States*, 468 U.S. 796, 804 (1984) (Fourth Amendment "exclusionary rule is a judicially prescribed remedial measure"). Accordingly, an attenuation limitation arose. *See Nardone* v. *United States*, 308 U.S. 338, 341 (1939); *Murray*, 108 S.Ct. at 2532-33. Under the Fifth Amendment, in contrast, the

distinction and defies this Court's holdings in *Mincey* and *Portash*. A writ of certiorari is therefore in order.

3. Certiorari is warranted to review the Second Circuit's dilution of the flat ban on use of defendant's immunized testimony that the defendant was promised and that the Fifth Amendment demands.

When granted immunity by the government, "the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt." *Portash*, 440 U.S. at 459. Such coercion is constitutional only when unadulterated use immunity is granted and respected. The judgment below dilutes that immunity to a pale, watery substitute for what the Constitution demands. According to the Second Circuit, when appellant Miron was immunized under 18 U.S.C. § 6002 and ordered by a federal court to answer the prosecutor's questions under pain of contempt, all the court really meant was this:

> Answer and incriminate yourself, or go to jail. The government may investigate, indict and convict you with your own words, so long as it turns out that the government also has sufficient additional evidence from other, untainted sources to accomplish those ends without using your testimony. You are assured only that *if* your testimony is used against you, it won't be the *only* evidence that incriminates you. The government promises only that you won't be forced to hang yourself — but it reserves the right to weave your coerced testimony into the rope of the hangman's noose.

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gravamen of the constitutional wrong is the *use* against the defendant of his coerced testimony, not the mere act of compelling him to speak; the Fifth Amendment exclusionary rule is therefore an essential element of the constitutional right, not just a means of enforcing it — a means whose utility might be deemed marginal where the evidence made little or no ultimate difference to the outcome of the case.

It is hard to believe that any member of this Court would deem this "immunity" acceptable under the Fifth Amendment, which "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar*, 406 U.S. at 445. Thus, if Miron had in fact been offered prospectively only the assurance of watered-down immunity that the Second Circuit now gives him in retrospect, he might well have decided to remain silent. And, if Miron had been held in contempt as a result, that judgment of contempt could not have withstood review. For a contempt citation is proper only when "the grant of immunity has removed the dangers against which the privilege protects," *Kastigar*, 406 U.S. at 449, and it is clear that the Second Circuit's understanding of immunity under § 6002 left Miron very much in danger of self-incrimination.[14]

Instead of remaining silent, Miron accepted the plain meaning of § 6002 on its face, took the government at its word, and fully answered every question put to him. But for the grant of use immunity, Miron feared that revealing his close ties to the Gambino crime family and to corrupt labor bosses would prove incriminating, and it did; according to the court below, this is precisely why the government included Miron's testimony in its wiretap application. (A8). To Miron's surprise, the "immunity" he received, as now construed by the Second Circuit, left him exposed to the danger that the government would indeed be allowed to use his testimony to prosecute him so long as it developed lots of other evidence as well.

The Court of Appeals made much of its supposition that the government's use of Miron's immunized testimony left him

[14] "Unless the grant of immunity assures a witness that his incriminating testimony will not be used against him in a subsequent criminal prosecution, the witness has not received the certain protection of his Fifth Amendment privilege that he has been forced to exchange." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983). The only thing certain about the constitutionally mandated protection Miron received was that it was violated by the government.

in the same position as if he had never testified, since the wiretap would have been authorized even without the use of that testimony. (A9, A12). That is misleading. Once Miron appeared before the grand jury under a government subpoena, his decision to answer rather than be held in contempt *did* put him in a worse position under the government's and the Second Circuit's view of the matter. For if Miron had refused to answer after being promised only the incomplete use immunity that the Second Circuit now holds he received, his ensuing contempt judgment would have been promptly appealed and overturned. Having trusted the government and answered its questions fully, Miron should be no worse off. The Second Circuit's judgment therefore merits plenary consideration by this Court if the Fifth Amendment's promise is to be kept.

II. THE JUDGMENT BELOW DEFIES *SANTOBELLO* v. *NEW YORK* AND CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS MANDATING JUDICIAL RELIEF WHEN THE GOVERNMENT VIOLATES AN AGREEMENT MADE WITH A DEFENDANT, NOTWITHSTANDING SHOWINGS OF INADVERTENCE OR IMMATERIALITY.

When defendant Miron testified before the grand jury pursuant to an order of the district court, the government promised that, in exchange for his truthful testimony, none of that "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or information) [would] be used against [Miron] in any criminal case." 18 U.S.C. § 6002. In our system of justice, it is beyond cavil that "[a]ny agreement made by the government must be scrupulously performed and kept." *United States* v. *Lyons*, 670 F.2d 77, 80 (7th Cir.) (citing *Santobello* v. *New York*, 404

U.S. 257, 262 (1971)), *cert. denied*, 457 U.S. 1136 (1982). As the Chief Justice wrote for the Court in *United States* v. *Apfelbaum*, 445 U.S. 114, 130 (1980), the government grants a witness immunity under § 6002 "in exchange for his compelled testimony," and the government must "ke[ep] its part of the bargain."

Prosecutors' agreements with defendants, and hence this case, are governed by the principles of *Santobello* v. *New York*, 404 U.S. 257 (1971), where a defendant pled guilty in exchange for the prosecutor's promise not to make any recommendation as to sentence. At the sentencing hearing, a different attorney from the prosecutor's office appeared and, "apparently ignorant of his colleague's commitment," *id.* at 259, recommended the maximum sentence, which the judge imposed. In his opinion for the Court, Chief Justice Burger described the prosecution's breach of promise not as a product of bad faith, but as "an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices. The heavy workload may explain these episodes, but it does not excuse them." *Id.* at 260. "That the breach of agreement was inadvertent does not lessen its impact." *Id.* at 262.

This Court was likewise unpersuaded by the government's argument that the breach of promise was harmless because it had no impact on the judge's sentencing decision: "at this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial." *Id.* Even though the sentencing judge declared that the prosecutor's recommendation did not "make a particle of difference" in the court's decision, *id.* at 259 — a statement this Court accepted at full value, *id.* at 262 — the Court unanimously concluded that "the interests of justice" and "appropriate recognition of the duties of the prosecution in relation to promises made" required that the judgment of conviction be vacated, *id.* at 262-63.

Quite apart from the Self-Incrimination Clause, the contractual due process analysis applied by this Court to plea bargains in *Santobello* has been held by many Circuit Courts of Appeals to "appl[y] equally well to promises of immunity from prosecution." *Rowe* v. *Griffin*, 676 F.2d 524, 528 (11th Cir. 1982). For example, in *Rowe* the Eleventh Circuit sustained a permanent injunction against state prosecution of a witness who had testified for the state in exchange for a promise of transactional immunity.

> When such a promise induces a defendant to waive his fifth amendment rights by testifying . . . or to otherwise cooperate with the government to his detriment, due process requires that the prosecutor's promise be fulfilled. . . . [O]nce the defendant's good faith compliance with the terms of the agreement is established, the state must perform on its side and any attempt by the state to breach the agreement is per se a bad faith prosecution.

Id. The *Santobello* analysis has similarly been applied to the enforcement of immunity agreements by the Courts of Appeals in the Fourth,[15] Fifth,[16] Seventh,[17] and Eighth Circuits.[18]

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[15] *United States* v. *Carter*, 454 F.2d 426 (4th Cir.1972) (en banc), *aff'd after remand*, 490 F.2d 1407, *cert. denied*, 417 U.S. 933 (1974), remanded for a hearing on whether the government had broken its plea bargain and cooperation agreement with a witness, in which the government had promised both use and transactional immunity: "if the promise [of immunity] was made to defendant as alleged and defendant relied upon it in incriminating himself and others, the government should be held to abide by its terms" and "the indictment should be dismissed." 454 F.2d at 427-28.

[16] *United States* v. *Weiss*, 599 F.2d 730 (5th Cir. 1979), held that "where a plea, confession or admission is based on a promise of a plea bargain or immunity, the government must keep its promise." *Id.* at 737 (citing *Santobello*). "In that context, the guiding concern is the protection of the defendant's Fifth Amendment privilege against the compulsion of self-incriminating testimony." *Id.* The conviction at issue in *Weiss* was affirmed because the court found that there had been, in fact, no governmental promise not to prosecute and because "no evidence against [the defendant] in this case [was] obtained as a result of his cooperation." *Id.*

[footnotes 17 and 18 appear on page 23]

In direct conflict with those five circuits, the majority below held *Santobello* inapplicable to immunity promises used to extract testimony. Judge Winter rejected *Santobello's* analysis of prosecutorial promises in favor of the analysis adopted by a lower court in, of all things, a commercial transaction case holding that a plaintiff in a breach of contract action has not made out a prima facie case if he fails to include an "allegation of facts showing damages." (A13). Whatever the prevailing standard for pleading commercial contract claims in the Second Circuit, it is obviously less relevant here than the due process analysis held by this Court to govern agreements between prosecutors and criminal defendants. In *Santobello*, this Court

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[17] *United States* v. *Brimberry*, 744 F.2d 580 (7th Cir. 1984), relied on *Santobello* in remanding for a hearing on whether the government made derivative use of defendant's testimony to indict and convict him in violation of the use immunity that was part of his plea bargain. It held that if the government had in fact thus breached its agreement, "the indictment must be dismissed." *Id.* at 587-88. *See also id.* at 587 ("It is clear beyond question that, in our system of government, '[a]ny agreement made by the government must be scrupulously performed and kept.'") (citation omitted).

In *United States* v. *Lyons*, 670 F.2d 77 (7th Cir.), *cert. denied*, 457 U.S. 1136 (1982), the court of appeals found that "[t]he most serious of appellant's contentions . . . regard[s] use of evidence against him which was derived as a result of leads obtained from his statements during negotiations for immunity. Any agreement made by the government must be scrupulously performed and kept." *Id.* at 80 (citing *Santobello*). The conviction was affirmed only when the court determined that no promise of derivative use immunity had in fact been made by the prosecutor during the interview with the defendant.

[18] *United States* v. *Brown*, 801 F.2d 352, 355 (8th Cir. 1986), remanded for a hearing on whether the witness had breached and thereby voided his cooperation agreement with the government, in which the prosecutor had promised use immunity and transactional immunity. The court held that prosecutorial promises of immunity are analogous to the prosecutorial promises made in connection with the plea bargain in *Santobello*, *id.* at 354: "If the district court determines that [the defendant] did not breach the cooperation agreement, fundamental fairness requires the government to uphold its part of the agreement and the district court may enforce the agreement by dismissing the indictment." *Id.* at 355. Alternatively, the court of appeals explained, if the defendant in fact breached the agreement, the government may prosecute him for the transaction in question, but "the government [still] may not use any information obtained, directly or indirectly, from [the defendant] as a result of the cooperation agreement." *Id.*

unanimously and explicitly rejected the harmless error exception embraced by the Second Circuit on the basis of that court's commercial transaction analogy; *per se* reversible error was found to lie in the prosecution's inadvertent breach of promise even though the trial court expressly found, and this Court expressly assumed, that this breach did not "make a particle of difference" in the outcome of the case. 404 U.S. at 259; *id.* at 262.[19]

In his separate concurring opinion, Judge Van Graafeiland likewise declined to apply the due process principles of *Santobello* on the basis of his conclusion that a grant of immunity under § 6002 "is not the stuff of which contracts are made" because Miron "had no choice whether to accept [the grant of immunity]; he was required to testify." (A25). Yet Congress expressly conceived of use immunity as a "bargaining process,"[20] a "meeting of the minds between the prosecutor and the witness,"[21] and an "exchange of immunity" for testimony,[22] even when the witness had to be summoned by subpoena and ordered to answer under a grant of immunity.[23] Congress understood, as did Judge Altimari in his dissenting opinion (A35-36),

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[19] *See also In the Matter of John Doe*, 410 F.Supp. 1163, 1166 (E.D.Mich. 1976) ("Neither may the government insist that [defendant] demonstrate some prejudice before claiming a violation of his rights in the government's broken promise. No prejudice, apart from that suffered by the administration of justice, was apparent in *Santobello*."). It is irrelevant in a context such as this that the harmless error inquiry prescribed by Fed.R.Crim.P. 52(a) overrides any contrary supervisory rule "not . . . required by the Constitution or the Congress," *Bank of Nova Scotia* v. *United States*, 108 S.Ct. 2369, 2373 (1988) (quoting *United States* v. *Hasting*, 461 U.S. 499, 505 (1983)), since the *Santobello* rule is grounded in the Due Process Clause, not in this Court's supervisory power.

[20] *Federal Immunity of Witnesses Act: Hearings on H.R.11157 and H.R. 12041 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. 41 (1969) (statement of Will Wilson, Asst. Att'y General, Criminal Division) [hereinafter cited as *Hearings*].

[21] *Id.* at 46.

[22] *Id.* at 42.

[23] *Id.*

that a witness ordered to answer under § 6002 still has a very real and important decision to make. Miron's choice was between, on the one hand, trusting the government's promise of immunity and giving complete and candid testimony, and, on the other hand, remaining silent and risking civil contempt, or testifying but committing perjury.[24] It is for this reason that this Court and others, although not the court below, have always understood a grant of § 6002 immunity to be an enforceable exchange of promises between government and witness.[25]

By rejecting outright the application of *Santobello's* due process principles to prosecutorial promises and agreements outside the plea bargain context, the court below arbitrarily truncated the Due Process Clause and placed the Second Circuit in conflict with the holdings of five other circuits. Unlike the nearly unanimous en banc panel of the Fourth Circuit Court of Appeals, which followed *Santobello* in enforcing promises of immunity, *United States* v. *Carter*, 454 F.2d at 427-29, the Second Circuit failed to recognize that "[t]here is more at stake [here] than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice. . . ." *Id.* at 428. Certiorari is in order to resolve this circuit conflict and to preserve the integrity of immunity promises by the government.

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[24] An immunity statute is used not as an exclusionary rule against completed violations to deter prosecutors from future violations of the privilege, but rather as a preventive mechanism: to protect the witness from a *present* choice between perjury and disclosure of incriminating information. *See* J. Wigmore, *Evidence* § 2251 (McNaughton rev.ed. 1961).

[25] *See, e.g., United States* v. *Apfelbaum*, 445 U.S. 114, 130 (1980) (the government grants a witness immunity under § 6002 "in exchange for his compelled testimony"); *United States* v. *Tramunti*, 500 F.2d 1334, 1342 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974) ("The theory of immunity statutes is that in return for his surrender of his Fifth Amendment right to remain silent lest he incriminate himself, the witness is promised that he will not be prosecuted based on the inculpatory evidence he gives in exchange.").

III. THE COURT BELOW USURPED THE ROLE OF THE LEGISLATURE BY COUNTERMANDING THE CONGRESSIONAL POLICY JUDGMENT, MADE IN 18 U.S.C. § 6002, THAT THE PUBLIC INTEREST IN PRESERVING A CREDIBLE IMMUNITY STATUTE IN ORDER TO GATHER INFORMATION ESSENTIAL TO EFFECTIVE LAW ENFORCEMENT OUTWEIGHS THE GOVERNMENT'S INTEREST IN USING IMMUNIZED TESTIMONY TO PROSECUTE A WITNESS.

In enacting 18 U.S.C. § 6002, Congress concurred in the judgment that a grant of immunity to a reluctant witness is "the most valuable tool the Government has in the development of cases and the enforcement of the criminal law." *Hearings, supra*, at 42 (statement of Asst. Att'y Gen. Wilson). The nation "need[ed] a new broad general witness immunity law . . . to gather evidence to strike at the leadership of organized crime . . . ." H.R.Rep. No. 1188, 91st Cong., 2d Sess. 8 (1970) (quoting the President's April 23, 1969 Message on Organized Crime).[26] With the aid of information procured through grants of immunity, "the Department of Justice has been able to obtain many indictments and convictions against major violators, especially in the fields of organized crime and labor racketeering, which otherwise would most probably not have been possible." *Hearings, supra*, at 39 (statement of Asst. Att'y Gen. Wilson). Congress anticipated that its new use immunity statute, § 6002, would be an even more effective law enforcement tool than prior laws and Congress consequently expected a huge increase in the volume of immunity grants and the information obtained thereby. *Id.* at 43. Congress

[26] *See also Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 252, 253 (1983); *Hearings, supra*, at 31 (statement of Rep. Poff); *id.* at 50-53 (statement of the Hon. George Edwards, U.S. Circuit Judge, Member, Nat'l Comm'n On Reform of Federal Criminal Laws).

was informed that although a grant of use immunity would probably fail to extract testimony from the senior and most committed members of organized crime, who operate under the code of silence known as Omerta, it would successfully induce testimony by the "weak link" in the conspiracy — peripheral associates who feared federal prosecutors more than they feared the mob's leaders. *Hearings, supra*, at 50-53 (statement of the Hon. George Edwards, U.S. Circuit Judge, Member, Nat'l Comm'n On Reform of Federal Criminal Laws). Once the fear of prosecution with their own words had been allayed by a grant of use immunity, such witnesses could be expected to testify.

Congress recognized the trade-off inherent in a use immunity regime. Information necessary to prosecuting racketeering by others is gained, but future prosecution of the testifying witness for his role in such activities becomes extremely difficult because of the extraordinary burden placed on the government to show that all of its evidence against the witness is independent of and untainted by the immunized testimony. *Id.* at 52-54. *See also id.* at 47 (statement of Asst. Att'y Gen. Wilson); *Braswell* v. *United States*, 108 S.Ct. 2284, 2295 (1988). Congress made it clear that if the evidence the government used to further its investigation of the witness or to procure his conviction had any "connection" with the immunized testimony, "it becomes tainted and cannot be used." *Hearings, supra*, at 53 (statement of Rep. Poff, sponsor of the immunity legislation and Vice Chairman of the Nat'l Comm'n on Reform of the Federal Criminal Laws).[27] From the outset, Congress made it clear that stringent enforcement of the ban on direct and derivative use of immunized testimony against a witness was essential to its design. *See, e.g., id.* at 52 (statement of Judge

[27] The Assistant Attorney General in charge of the Criminal Division acknowledged this trade-off in a memorandum explaining § 6002 to U.S. Attorneys in 1971. *See* Dept. of Justice Memo No. 595, Supp. 1, Sept. 2, 1971, p. 5 & n. 4.

Edwards). "The primary law enforcement interest is to maximize the amount of information that the witness provides. A broad construction of the immunity grant serves that purpose; a narrow construction can only motivate witnesses to be as unresponsive as possible." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 289 (1983) (Stevens, J., dissenting). As this Court has repeatedly emphasized, a witness' "primary interest is that the protection be certain." *Id.* at 257 (opinion of the Court). *See also id.* at 258, 261, 263 n.23. With that in mind, Congress enacted — in the words of one of § 6002's principal drafters — an immunity statute that offered every prospective witness ironclad protection against subsequent use: "No honest citizen need fear it; no dishonest citizen need fear it; no criminal need fear it." *Hearings, supra*, at 58 (statement of Prof. Robert Dixon).

The credibility of § 6002's offer of immunity, and therefore the efficacy of the statute, has been seriously undermined by the judgment below. Even if the Second Circuit has forgotten what a witness risks when he is forced to make incriminating statements before a grand jury, future witnesses will doubtless remember. They will not be reassured by the Second Circuit's nice distinctions between most unlawful use of immunized testimony and such unlawful use as can in hindsight be labeled "immaterial" or "surplus." As the dissent below recognized, the Second Circuit's judgment sadly ensures that prosecutors' future promises of immunity will be met with a jaundiced eye and a closed mouth:

> As a practical matter, this means that witnesses granted "use" immunity in the future will think twice about testifying truthfully (or at all) rather than run the risk that the government will later be able to use the "immunized" testimony against them. Absent enforcement of the "very substantial protection" afforded by the federal immunity statute against compulsory self-incrimination, *Kastigar*,

> 406 U.S. at 461, both law enforcement and the constitutional rights of immunized witnesses will most assuredly be impaired.

(A36) (Altimari, J., dissenting).

The executive branch has complete discretion as to *which witnesses* to immunize, but the *nature* of the immunity it grants is determined by Congress. Immunity under § 6002 is "a fixed price that the government must pay to obtain certain kinds of information." *Hearings, supra*, at 69 (statement of Prof. Dixon). Prosecutors may be caught up in the drive to preserve a conviction in an isolated case; Congress is concerned with ensuring ongoing, effective law enforcement on a broader plain by maintaining the flow of vital information. When the government does decide to purchase information by a grant of immunity, therefore, it must pay the full, fixed price dictated by Congress in § 6002. *See id.* That statute allows immunized testimony to be used against the witness who gave it only in a prosecution for perjury. *See* § 6002; *United States* v. *Apfelbaum*, 445 U.S. 115, 122, 130 (1980).

As written, the immunity statute contains no exception for using testimony against a witness so long as plenty of untainted, independent evidence is piled on as well. Whether to insert such a qualification — and thereby increase the number of witnesses who would rather be jailed for contempt than provide evidence that could lead to their own conviction for substantive offenses — entails a policy choice to be made by Congress, not by the judiciary. *See Marchetti* v. *United States*, 390 U.S. 39, 59 (1968). Even if the trade-off endorsed by the Second Circuit were sound policy, "the Constitution has entrusted to Congress, and not to [any court], the task of striking [such a] balance," *id.* at 60, especially where doing so would require the court "not merely to strike out words, but to insert words that are not now in the statute," *id.* at 60 n.18 — words drawing

a line between "material" use and use that in retrospect can be portrayed as undecisive. The policy choice that Congress in fact made in § 6002, reflecting the pursuit of certainty in the protection of reluctant witnesses, drew no such line. The threat to the congressional immunity regime posed by the Second Circuit's arrogation of the legislative role warrants the plenary attention of this Court.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted.

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
BRIAN STUART KOUKOUTCHOS
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

ANDREW M. LAWLER
SHARON D. FELDMAN
ANDREW M. LAWLER, P.C.
220 East 42nd Street
New York, New York 10017

February 10, 1989

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 560—August Term, 1987

(Argued January 4, 1988 Decided September 22, 1988)

Docket No. 87-1379

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH N. GALLO, JOSEPH ARMONE, JOSEPH CORRARO, ROBERT DIBERNARDO, JAMES FAILLA, JOSEPH ZINGARO, THOMAS AGRO, ROBERT DESIMONE, JACK GIARDANO, ANGELO RUGGIERO, ANTHONY VITTA, GEORGE DALY, LOUIS GIARDINA, SALVATORE MIGLIORISI, JULIE MIRON, MILDRED RUSSO,

Defendants,

JULIE MIRON,

Defendant-Appellant.

Before:

VAN GRAAFEILAND, WINTER and ALTIMARI,

Circuit Judges.

WINTER, *Circuit Judge*:

This appeal raises in stark form the question of under what circumstances a defendant is entitled to a dismissal of an indictment where his fifth amendment rights have been violated by the inadvertent inclusion of prior immunized testimony in an application for electronic surveillance that led to evidence of his criminality.

Julie Miron testified under a grant of immunity before a grand jury looking into the activities of now-convicted labor-racketeer John Cody. A paragraph of Miron's testimony was erroneously included in a lengthy application for an extension of an electronic surveillance authorization in the home of the late Paul Castellano. The surveillance eventually uncovered a labor payoff scheme implicating Miron. The paragraph containing the immunized testimony was so inconsequential, however, that it could not have influenced the government's decision to seek or the district judge's decision to issue the surveillance order. Because inclusion of the paragraph did not affect the course of events leading to Miron's conviction, I would affirm the judgment of conviction.

BACKGROUND

In March 1980 the Organized Crime Strike Force of the Eastern District of New York obtained an order compelling Julie Miron, the president of several building supply corporations, to testify before a grand jury investigating John Cody, a former labor official with suspected ties to organized crime. Miron's testimony was given under a grant of immunity pursuant to 18 U.S.C. § 6002 (1982), following Miron's assertion of his fifth amendment privilege in response to the question: "Do you know John Cody?"

On June 18, 1980, Miron appeared before the grand jury and answered questions about the union contracts of his building

supply companies, his relationship with John Cody, and his relationship with the late Paul Castellano, the alleged boss of the Gambino organized crime family. Miron testified that one of his companies had a contract with a union headed by Cody and that he had other business dealings with Cody and Cody's son. Miron also testified that his companies had supplied building materials to Castellano's sons and that he met with Castellano and John Cody at a Manhattan restaurant to resolve a dispute about the price of those materials.

The grand jury investigation culminated in the indictment and conviction of Cody on labor-racketeering charges. Although Miron did not testify at Cody's trial, a special agent of the Strike Force provided Miron's grand jury testimony to the probation officer who prepared Cody's presentence report. The report used Miron's immunized testimony to establish a connection between Cody and Castellano.

Subsequently, the Booklyn Strike Force initiated an investigation of potential racketeering violations by the Gambino organized crime family. On November 12, 1982, the government applied for authorization to place electronic bugs in Castellano's home. In support of the application, an affidavit by an FBI agent recited information substantiating probable cause for a wiretap concerning possible loansharking and murder. The affidavit also recited other criminal activities of the Gambino crime family. On the basis of that affidavit, Judge Bramwell signed an order authorizing a 30-day wiretap. Because of logistical difficulties in installing the necessary equipment, the Strike Force applied for and received three extensions of the original wiretap order. None of these applications referred to Miron's immunized testimony.

Information revealed in conversations intercepted at the Castellano residence led the government on April 8, 1983 to seek another extension of the original order and a broader wiretap authorization to cover Hobbs and Taft-Hartley Act violations.

The affidavit supporting the application described the Gambino family's labor-racketeering activities, including providing "muscle" for and sharing payoffs with corrupt union officials, and stated that John Cody was one such official. In addition, the affidavit stated that reliable informants had told the FBI that Cody was a close associate of Carlo Gambino, former head of the organized crime family, and of Paul Castellano. Also included in the affidavit, however, was a reference to part of Miron's immunized 1980 grand jury testimony. Paragraph 18 stated:

> I am also informed . . . that during [the] investigation of the Cody case, he heard testimony from Julie Miron, the president of Miron Mason Supplies. Mr. Miron said that he had supplied materials for the construction for homes CASTELLANO'S sons were building on Staten Island. A dispute arose over the price Mr. Miron was charging for the materials. Mr. Miron was then contacted by John Cody on behalf of CASTELLANO. Cody said that he thought Mr. Miron's prices for the CASTELLANO materials were too high. Cody then arranged a meeting with PAUL CASTELLANO, Cody, and Miron attended to discuss this dispute.

The agent who included this paragraph did not know that it was based on immunized grand jury testimony.

The affidavit went on to describe a number of intercepted conversations involving explicit and extensive labor-racketeering activities. It also stated that cars registered in Miron's name arrived at the Castellano residence and that Miron visited the home, after arranging a meeting with Castellano in a phone conversation during which Miron used a code name.

On April 8, 1983, Judge Bramwell extended and expanded the wiretap authorization as requested by the government. Con-

versations intercepted thereafter implicated Miron and his co-defendants in a large-scale labor payoff scheme involving the use of non-union labor on multi-million dollar contracts for work on Mobil Oil Corporation's deep water terminal and pipeline facility at Port Mobil, New York.

Based on this evidence, Miron was indicted on Taft-Hartley, racketeering and obstruction of justice charges in June 1986. Before trial, Miron moved to dismiss the indictment or, alternatively, to suppress the evidence on the ground that the government had improperly used his immunized grand jury testimony to obtain both the indictment and the evidence to be used against him at trial. Then Chief Judge Weinstein denied the motion, stating that the small part of Miron's immunized 1980 grand jury testimony referred to in the wiretap affidavit was "of no significance," and that its use was like "having a horse blanket and throwing it on top of . . . a little handkerchief, no effect whatsoever." Judge Weinstein found that: (1) the FBI agent who prepared the affidavit in question did not know that Miron's testimony had been immunized; and (2) the government proved beyond a reasonable doubt the existence of "wholly independent legitimate sources" causing the government to apply for and the district court to grant the renewed and expanded wiretap order. He concluded that

> It is apparent that (1) any judge of this court would have taken the same action, and that (2) the absence of the Miron references would have made no difference in the result. In terms of the order actually obtained, the immunized testimony of Miron had no impact at all.

DISCUSSION

The parties agree that the evidence against Miron developed through the electronic surveillance authorization was the basis

for his conviction. This appeal presents two issues: (1) whether the government's use of Miron's immunized testimony violated his fifth amendment and statutory rights; and (2) if so, whether he is entitled to relief for improper use of his immunized testimony where use of the testimony did not affect the course of events leading to his indictment.

1. *Unlawful Use of Immunized Testimony*

I believe it is clear that the portion of Miron's grand jury testimony used in the affidavit was subject to a valid claim of privilege. The precise question causing Miron to invoke the fifth amendment, and the government to enforce the immunity order, was "Do you know John Cody?" No claim was made by the government that the privilege was improperly invoked, as an admission to a relationship with Cody might well have been a link in a chain of evidence showing criminality. *See Hoffman v. United States*, 341 U.S. 479, 486-87 (1951). Had Miron continued to refuse to testify concerning his relationship with Cody, which of course led to disclosure of his relationship with Castellano, Miron would have been held in contempt. That testimony is thus covered by use-immunity under 18 U.S.C. § 6002 (1982).[1]

The government argues, however, that because the crimes committed by Miron occurred after he gave his immunized tes-

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[1] That statute states:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to . . . a court or grand jury of the United States . . . the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

timony, the use of that testimony in securing the indictment and his conviction violates neither the statute nor the fifth amendment. I do not discern in relevant Supreme Court decisions such a broad principle. Indeed, *Marchetti v. United States*, 390 U.S. 39 (1968), held the registration provisions of the gambling tax statutes unconstitutional on the ground that "[p]rospective registrants can reasonably expect that registration . . . will significantly enhance the likelihood of their prosecution for future acts, and that it will readily provide evidence which will facilitate their convictions." *Id.* at 54. *Marchetti* rejected an inflexible "chronological formula" because it might open avenues for evasion of the privilege and adopted as the proper test "the substantiality of the risks of incrimination." *Id.* Because compliance with the registration provisions of the gambling tax statutes virtually always required the registrant to announce an intention to commence violations of various state and federal gambling statutes, the risk of incrimination was high indeed and the Court invalidated the provisions in question.

In a later case, *United States v. Freed*, 401 U.S. 601 (1971), the Court upheld the registration provisions of the National Firearms Acts that require the transferor to register the transfer prior to its execution by providing the fingerprints and photograph of the transferee. Once the registration is approved (transfers to persons with criminal records being prohibited), the transfer may take place. The Court rejected the argument that registration might incriminate the transferee for future crimes. Its rationale, however, was not that the fifth amendment makes strict chronological distinctions, but that the risk of incrimination as to future crimes was insubstantial because the government had assured the Court that registration data was not made available by the Internal Revenue Service to local, state or federal law enforcement agencies, except for the prosecution of unlawful failures to register. Because other agencies "never

see the information," the Court reasoned, the transferee "is left in the same position as if he had not given it." *Id.* at 606.

I believe the facts in the instant case are governed by *Marchetti* rather than *Freed*. The grand jury here was gathering information about ongoing criminal activity involving labor racketeering, and the information it gathered was available to federal law enforcement officials. In a real sense, therefore, testimony by Miron regarding his business, which was closely related to the construction industry and involved union contracts, his relationship with Cody, who was the subject of the investigation, and his relationship with Castellano, who was a widely-reputed organized crime boss, disclosed "links in a chain of evidence," *Marchetti*, 390 U.S. at 48, that were potentially incriminating both as to past and future crimes arising out of the activity being investigated. The very use of Miron's immunized testimony in the application for an extension and expansion of the surveillance authorization demonstrates the testimony's inculpatory nature. As in *Marchetti*, therefore, application of an inflexible chronological test in the present circumstances would open avenues of evasion, by allowing a grand jury investigating ongoing activity to immunize a person so as to obtain testimony that would thereafter support probable cause for electronic surveillance of that person. Moreover, because labor racketeering is, like gambling, generally an ongoing activity, a substantial risk of incrimination attends the questioning of persons in situations similar to Miron's. I thus conclude that the use of Miron's immunized testimony violated the use-immunity statute and the fifth amendment.

2. *Harmless Error*

I conclude, however, that the violation of Miron's statutory and constitutional rights had no effect on the course of events leading to his indictment and conviction and therefore does

not require dismissal of the indictment. The affidavit contained numerous facts directly establishing probable cause to extend the prior order concerning loansharking, extortion and murder, and to expand it to include labor racketeering. The evidence of conversations in Castellano's home relating to labor racketeering was quite explicit with regard to ends, means and the unions involved. The short paragraph derived from Miron's immunized testimony merely indicated that Miron knew Cody, then a convicted labor racketeer, and that Miron had met with Castellano to discuss innocent matters at Cody's suggestion. This was of negligible significance, however, in light of independent evidence that, after the grand jury testimony, Miron's cars were seen at Castellano's home and that Miron used a code name in a phone call to arrange a meeting with Castellano. The district court was thus entirely correct in concluding that "even without [the immunized] testimony, the government would have acted exactly as it did, and no judge of this court would have deviated in the slightest from the course of granting orders authorizing the bugs that revealed information incriminatory to Miron."

That finding being fully supported, I would affirm. The existence of a federal constitutional violation does not *per se* compel relief. *Chapman v. California*, 386 U.S. 18, 21-22 (1967). "[S]ome constitutional errors . . . are so unimportant and insigificant" and have so "little, if any, likelihood of having changed the result of the [proceeding]" that they "may . . . be deemed harmless." *Id.* at 22. With such errors, the court must be able to declare its belief that the error was harmless beyond a reasonable doubt, *id.* at 21-24, as the district court did in this case.

In examining a particular error to determine whether it was harmless, we bear in mind that "while there are some errors to which *Chapman* does not apply, they are the exception and not the rule." *Rose v. Clark*, 106 S.Ct. 3101, 3016 (1986). An example of a violation to which *Chapman* would not apply

would be the denial of the assistance of counsel at trial. *See Gideon v. Wainwright*, 372 U.S. 335 (1963). In such a case, of course, the error permeates the entire proceeding, and harmless error analysis would inevitably entail speculation. Where the effect of the error is more confined, however, we can be more confident of a judgment as to its effect on the proceeding as having been harmless beyond a reasonable doubt. *See, e.g., Rushen v. Spain*, 464 U.S. 114, 118 (1983) (per curiam) (*ex parte* communications to judge); *United States v. Hasting*, 461 U.S. 499, 508-09 (1983) (improper comment on defendant's failure to testify); *Milton v. Wainwright*, 407 U.S. 371 (1972) (admission of confession obtained in violation of right to counsel); *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of fourth amendment); *Harrington v. California*, 395 U.S. 250, 251-54 (1969) (admission of non-testifying codefendant's statement).

The defect in the instant case does not fit within the "limited category of constitutional errors that are deemed prejudicial in every case." *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). This case requires us only to render a judgment concerning the significance of the paragraph of immunized material as the finding of probable cause. I conclude that the use of immunized testimony in this case constituted harmless error beyond a reasonable doubt. *See United States v. Nemes*, 555 F.2d 51, 55-56 (2d Cir. 1977) (use of immunized testimony in indictment subject to harmless error rule); *United States v. Byrd*, 756 F.2d 1524, 1530-31 (11th Cir. 1985) (same); *United States v. Gregory*, 730 F.2d 692, 697-98 (11th Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985); *United States v. Shelton*, 669 F.2d 446, 461-64 (7th Cir.), *cert. denied*, 456 U.S. 934 (1982). Here the record plainly indicates that, except for the single paragraph in question, the government's information came from reliable FBI informants other than appellant, and from direct surveillance, and that the paragraph in question was of negligible significance. *See Kastigar v. United States*, 406

U.S. 441, 460 (1972) (evidence introduced by government must be derived from legitimate sources wholly independent of compelled testimony); *United States v. Mariani*, No. 87-1394, slip op. (2d Cir. July 11, 1988) (same); *United States v. Seiffert*, 501 F.2d 974, 982 (5th Cir. 1974); *United States v. Kurzer*, 534 F.2d 511, 516 (2d Cir. 1976); *United States v. Hampton*, 775 F.2d 1479, 1485-86 (11th Cir. 1985). With regard to labor racketeering, the subsequent extension and expansion of the order was not a borderline case. The affidavit recited a range of explicit information from confidential sources and intercepted conversations showing that the Gambino organized crime family was engaged in labor racketeering, and that conversations in furtherance of that racketeering were occurring in Castellano's home. Miron, who owned a building supply business, had arranged a meeting at Castellano's home under a code name, and his cars were seen there on other occasions.

In concluding that the inadvertant use of immunized testimony in this case was harmless, I find support in decisions concerning whether evidence is tainted as a result of inaccuracies subsequently found in an affidavit supporting an application for a warrant. Under *Franks v. Delaware*, 438 U.S. 154 (1978), a reviewing court must examine the unchallenged portions of the affidavit and determine whether those portions are sufficient to support a probable cause finding. The analogy between fourth and fifth amendment cases is, of course, limited. As *Kurzer* stated,

> The reason is that the principal function of the Fourth Amendment exclusionary rule is to deter unlawful police conduct, and it can be argued that it serves little deterrent purpose to exclude evidence which is only indirectly and by an attenuated chain of causation the product of improper police conduct. The Fifth Amendment, in contrast, is by its terms an exclusionary rule, and as implemented in

> the immunity statute is a very broad one, prohibiting the use not only of evidence, but of "information," "directly or indirectly derived" from the immunized testimony. The statute requires not merely that evidence be excluded when such exclusion would deter wrongful police or prosecution conduct, but that the witness be left "in substantially the same position as if [he] had claimed the Fifth Amendment privilege."

534 F.2d at 516 (citations omitted). *Kurzer* says no more, however, than that when the defendant has been put at a disadvantage because of the use of his immunized testimony, although indirect and attenuated, then he deserves relief under *Kastigar*. In the instant case, the use of immunized testimony did not disadvantage Miron. Moreover, I can state with confidence not only that the unchallenged portions of the affidavit would support a finding a probable cause, but also that any judge would have made such a finding.

My analysis is bolstered by the recent decision in *Murray v. United States*, 108 S.Ct. 2529 (1988), a fourth amendment case ruling that the "independent source" doctrine permits the admission of evidence initially discovered during an unlawful search but later obtained independently from lawful activities. The Court noted that the situation would be different if the government's decision to seek the warrant or the judge's decision to issue the warrant had been affected by what was observed during the illegal initial search. The *Murray* holding clearly is apposite to the instant case, where neither the government's decision to seek the expanded wiretap order nor the judge's decision to grant it was affected by the use of the small portion of immunized testimony.

In addition, the contract analogy urged by appellant supports, rather than undermines, my conclusion. Appellant argues that immunity is based on a bargained exchange between

the government and the witness — in return for his partial surrender of his right to remain silent, the witness is promised that the information he provides will not be used against him. Appellant asks us to rule that any breach of this agreement, however immaterial, requires that the judgment of conviction be vacated. I cannot agree. Such a rule would vitiate the function of the harmless error rule. While it is of utmost importance that the government respect and scrupulously observe restrictions on the use of immunized testimony, I see no reason to set aside an otherwise valid conviction because of an error that had no effect on the course of events. Application of a contract analogy to these facts does not lead us to a different result. A partial breach with no harm or damage to the complaining party cannot be a basis for a contract action. *See Calabria v. Associated Hospital Serv.*, 459 F. Supp. 946, 949 (S.D.N.Y. 1978) (without allegation of facts showing damages, action for breach of contract cannot be maintained), *aff'd sub nom. Spoto v. Associated Hospital Serv.*, 610 F.2d 807 (2d Cir. 1979).

In view of Judge Van Graafeiland's separate concurring opinion, the judgment is affirmed.

VAN GRAAFEILAND, *Circuit Judge*, concurring:

I agree fully with Judge Winter's holding that, regardless of whether the reference to Miron's grand jury testimony in the wiretap application violated his rights, the violation was harmless error, and I concur in the affirmance of the judgment of conviction. Without derogating in any way the strength of this concurrence, I also would affirm on the alternative grounds advanced by the district court. Hence, this concurring opinion.

FACTUAL BACKGROUND

Local 282 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America represents a group of truck drivers who operate in and around New York City. John Cody became president of the Local in 1976. Local 282 sponsors several employee benefit plans, and, from 1965 until 1983, John Cody was a trustee of the funds created under these plans. John Cody was both a bad president and a bad trustee.

Mismanagement of the plans' funds led to extensive civil litigation which resulted eventually in Cody's removal from his positions as trustee. *See Marshall v. Teamsters Local 282 Pension Trust Fund,* 458 F. Supp. 986 (E.D.N.Y. 1978); *Katsaros v. Cody,* 568 F. Supp. 360 (E.D.N.Y., 1983), *aff'd in permanent part,* 744 F.2d 270 (2d Cir.), *cert. denied,* 469 U.S. 1072 (1984). Misuse of Cody's offices also led to a 1980 federal grand jury investigation. The jury was interested primarily in ascertaining whether Cody was using his official status to compel the making of illegal payments or kickbacks. *See* 29 U.S.C. § 186(b). Cody was indicted and convicted on several counts which alleged the receipt of unlawful payments and on several related counts of tax evasion and fraud. *See United States v. Cody,* 722 F.2d 1052 (2d Cir. 1983), *cert. denied,* 467 U.S. 1226 (1984).

In 1980, appellant Miron, who was president of a number of building supply companies that hired Local 282 truck drivers, was called as a witness before the grand jury investigating Cody. Apparently the United States Attorneys Office had learned that Cody had intervened in a dispute between Miron and two of Paul Castellano's sons over prices charged by Miron for building supplies furnished to the sons. Miron was questioned concerning this incident. That portion of his testimony, which is the testimony at issue herein, is set forth in an appendix

to this opinion labeled Exhibit A. The obvious purpose of the quoted testimony was to show a relationship between Cody and Castellano, upon whose behalf Cody intervened. It was not directed in any way at Miron, who testified under a grant of general immunity.

Two years after the testimony was given, the Organized Crime Strike Force commenced an investigation into suspected criminal activities of the so-called Gambino "family". On November 12, 1982, the Strike Force applied to Judge Bramwell for an order authorizing the placement of an electronic surveillance device in the residence of Paul Castellano, a reputed member of the "family". In support of this application, the Strike Force submitted a 59-page affidavit asserting probable cause to believe that discussions about loansharking, extortion and conspiracy to commit murder took place at the Castellano residence.

Judge Bramwell authorized electronic surveillance for a 30-day period. This authorization had to be renewed three times before the FBI succeeded in entering the Castellano home and installing the surveillance device. During the first week of electronic surveillance, conversations were overheard which broadened the area of suspected illegal family activities to include labor racketeering. Accordingly, the Strike Force applied for another extension of the interception order and an expansion of the order to cover discussions involving labor matters. In support of this application, the Strike Force submitted the affidavit which gives rise to this appeal. The affidavit described the structure of the Gambino family's suspected labor racketeering operation and asserted the existence of a close association between the recently convicted Cody and Castellano. The affidavit stated in part:

> Since Cody assumed power with Local 282, he has been known by the Federal Bureau of Investigation and other

> law enforcement agencies as a close associate of several high-ranking organized crime figures. Informant information which has been corroborated by physical surveillance and Cody's own admissions to FBI agents established a close relationship between Cody and both Carlo Gambino and Ettore Zappi.
>
> After Gambino's death, Cody became associated with PAUL CASTELLANO, who succeeded Gambino as head of that organized crime family.

Without realizing that he was referring to immunized grand jury testimony, the FBI deponent followed the above-quoted paragraphs with the following one:

> I am also informed by Special Attorney Michael Guadagno of the Organized Crime Strike Force in the EDNY that during his investigation of the Cody case, he heard testimony from Julie Miron, the President of Miron Mason Supplies. Mr. Miron said that he had supplied materials for the construction for homes CASTELLANO'S sons were building on Staten Island. A dispute arose over the price Mr. Miron was charging for the materials. Mr. Miron was then contacted by John Cody on behalf of CASTELLANO. Cody said that he thought Mr. Miron's prices for the CASTELLANO materials were too high. Cody then arranged a meeting which PAUL CASTELLANO, Cody, and Miron attended to discuss this dispute.

Once again, the obvious purpose of the quoted paragraph was to show the existence of a relationship between Cody and Castellano. Insofar as Miron was concerned, the paragraph was completely innocuous.

On the basis of the above-described affidavit, Judge Bramwell authorized an additional 30-day extension of the intercep-

tion order and an expansion of its scope to cover labor matters. Conversations thereafter intercepted implicated Miron and some of his codefendants in a 1981-82 labor racketeering scheme involving Mobil Oil Corporation's deep water terminal and pipeline facility at Port Mobil, New York. This evidence, as well as evidence obtained through physical surveillance of the Castellano residence, led to Miron's indictment in 1986 on charges of racketeering, obstruction of justice, and violation of the Taft-Hartley Act.

Prior to trial, Miron moved unsuccessfully to dismiss the indictment against him or, alternatively, to suppress the evidence which was to be used against him, on the ground that the Government had made improper use of his grand jury testimony. Judge Weinstein denied that motion and also a post-trial motion for similar relief. In support of the latter, he wrote a scholarly and well-reasoned memorandum opinion in which he made the following factual findings:

(1) The FBI agent whose affidavit is challenged did not know that Miron's testimony, which the agent summarized, was given under a grant of immunity before a grand jury.
(2) The Assistant United States Attorney who told the FBI agent about Miron's testimony did not know what use the agent intended to make of it.
(3) The Government proved beyond a reasonable doubt the existence of "wholly independent legitimate sources" for both the petition and the granting of the extended bugging order.
(4) The reference to Miron's testimony in the application for the extention order was "of absolutely no significance" and Judge Bramwell would have granted the order "without that testimony."

(5) Miron's grand jury testimony, given in June 1980, related to events that occurred in the 1970's, while the crimes and predicate acts for which he was convicted took place between December 1981 and June 1983.

(6) It would have been impossible at the time of his grand jury testimony for Miron even to have contemplated the particular crimes of which he was convicted.

DISCUSSION

In my opinion, this case squarely presents the issue whether Justice Powell's broad language in *Kastigar v. United States*, 406 U.S. 441 (1972), was intended to mean that a grant of immunity under section 6002 will provide derivative use immunity for crimes not yet committed or even contemplated when the grant was made. My colleagues seek to avoid confronting this issue by making factual findings that directly contradict those of the district court summarized in the above paragraphs numbered (5) and (6). At the very outset of his opinion, Judge Weinstein expressed its theme to be "Immunization does not provide a warrant to commit new crimes." Thereafter, under the heading "Subsequent Crime Immunity", Judge Weinstein wrote:

> The government contends that we need not decide whether it has met its burden of proving wholly independent legitimate sources, because Miron could not in the first place have asserted the privilege in order to protect himself against prosecution for crimes committed *subsequent* to the compelled testimony. The defendant opposes any application of a subsequent act doctrine limiting his immunity.

> As already noted, Miron's testimony was compelled in June 1980. It related to events which took place in the 1970's. The particular conspiracy crimes and predicate acts for which he was convicted took place between December 1981 and June 1983.

Judge Weinstein then proceeded for twelve pages to develop and support his contention that Miron's grand jury testimony, given on June 18, 1980, did not immunize him against its use in connection with "noncontinuing new prospective" crimes committed several years later. Whether or not we agree with Judge Weinstein's legal conclusions, we cannot disregard his findings of fact. *Pullman-Standard v. Swint,* 456 U.S. 273, 287-90 (1982). Moreover, in moving from Judge Weinstein's findings to his conclusions of law, we should distinguish between the immunity created by the Constitution and the immunity created by statute. They are not necessarily the same. *Kastigar v. United States, supra,* 406 U.S. at 453; *Adams v. Maryland,* 347 U.S. 179, 181 (1954); *Smith v. United States,* 337 U.S. 137, 147 (1949).

The traditional long-settled constitutional rule was that the privilege against self-incrimination "has relation only to past acts, not to future acts that may or may not be committed." *United States v. Kahriger,* 345 U.S. 22, 32 (1953). "The object of the Amendment 'was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony that might tend to show that he himself had committed a crime.'" *Lefkowitz v. Turley,* 414 U.S. 70, 77 (1973) (quoting *Counselman v. Hitchcock,* 142 U.S. 547, 562 (1892)). "We fail to see how any answer could tend to incriminate when the crime presently involved was not committed or perhaps even contemplated when the answer was given." *United States v. Smith,* 206 F.2d 905, 908 (3d Cir. 1953); *see United States v. American Radiator & Standard Sanitary Corp.,* 278 F. Supp. 608, 612 (W.D. Pa. 1967).

Some minor exceptions to the traditional rule were created, largely as a result of federal licensing and taxing statutes which covered activities made unlawful under state law. Because of the incriminatory nature of the disclosures required by some of the federal laws, the Supreme Court abandoned the "rigid chronological distinction" between past and future criminal acts. *Marchetti v. United States*, 390 U.S. 39, 53 (1968). The correct test, the Court said, should be whether the defendant was "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Id.* The *Marchetti* Court recognized, however, that "prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination." *Id.* at 54; *see United States v. Apfelbaum*, 445 U.S. 115, 129-30 (1980); *United States v. Freed*, 401 U.S. 601, 606-07 (1971); *DeSimone v. United States*, 423 F.2d 576, 581 (2d Cir.), *cert. denied*, 400 U.S. 842 (1970). Licensing and taxing statutes aside, the only hazards of incrimination that are likely to be considered substantial and real are those which relate to existing or past misdeeds or a continuing course of criminal activity. *United States v. Quatermain, Drax*, 613 F.2d 38, 42-43 (3d Cir.), *cert. denied*, 446 U.S. 954 (1980). That is not the situation with which we are confronted in the instant case.

The immunity order at issue was a general order requiring Miron to testify "as to all matters about which he may be interrogated before said grand jury." My reading of the record satisfies me that the order was granted on March 12, 1980, and Miron did not testify until June 18, 1980. A pre-hearing general grant of immunity such as this is permitted under 18 U.S.C. § 6003. *United States v. Pacella*, 622 F.2d 640, 643-44 (2d Cir. 1980); *Matter of Application of the United States Senate Permanent Subcommittee on Investigations*, 655 F.2d 1232, 1236-37 & n.22 (D.C. Cir.), *cert. denied*, 454 U.S. 1084 (1981); *United States v. Leyva*, 513 F.2d 774, 775-76 (5th

Cir. 1975). Obviously, not "all matters about which [Miron was] interrogated" would have created substantial and real hazards of incrimination; *e.g.*, "What is your date of birth?", "How are you employed?". "[Fifth Amendment] protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." *Hoffman* v. *United States,* 341 U.S. 479, 486 (1951); *United States v. Seewald,* 450 F.2d 1159, 1163 (2d Cir. 1971), *cert. denied,* 405 U.S. 978 (1972). "[I]f the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the [Fifth Amendment] ceases to apply." *Brown v. Walker,* 161 U.S. 591, 597 (1896).

A fair reading of the testimony set forth in the appendix, Exhibit A, reveals no more than that Miron met Castellano in connection with an innocuous and lawful transaction, one that in no way incriminated Miron. *See O'Connell v. United States,* 40 F.2d 201, 204 (2d Cir.), *cert. dismissed,* 296 U.S. 667 (1930); *United States v. Seavers,* 472 F.2d 607, 611 (6th Cir. 1973). As the district court found, it would have been impossible at the time Miron gave this testimony for him even to have contemplated the particular crimes of which he was convicted.

However, if the Supreme Court's holding in *Kastigar v. United States, supra,* 406 U.S. 441 is as broad as Justice Powell's opinion would seem to indicate, even such an innocent question as "What is your name?", would forever entitle the witness to Fifth Amendment immunity for his answer. Indeed, no matter how innocuous a question may appear to be, if immunity is claimed, it would be the rare prosecutor, Attorney General, or judge who could guarantee that, twenty-five or thirty years later, the answer to the question would not be used derivately to connect the witness to some unlawful event. If the Constitution henceforth is to be construed in this manner, even a witness who has led an impeccable life would be well-

advised not to testify before a grand jury without a grant of complete immunity. A prosecutor also would be foolish to secure a general grant of immunity for a prospective witness, as Congress specifically has authorized him to do. The prosecutor might find that he unwittingly has given the prospective witness an "immunity bath", *see* H.R. Rep. No. 1549, 91st Cong., 2d Sess. 42, *reprinted in* 1970 U.S. Code Cong. & Admin. News 4007, 4017, or "insulation for a career of crime about to be launched." *United States v. Freed, supra,* 401 U.S. at 607.

Kastigar views the issue of immunity from the retrospective viewpoint of what follows from a grant of immunity; it does not address the prospective issue whether immunity should be granted in the first place. When a Fifth Amendment privilege is asserted, the prosecutor must make a prompt decision whether to seek a grant of immunity. He then must secure permission from the Attorney General before applying for a court order. "The purpose of § 6002 [sic] was to . . . limit the use of immunity to those cases in which the Attorney General, or officials designated by him, determine that gaining the witness' testimony outweighs the loss of the opportunity for criminal prosecution of that witness." *Pillsbury Co. v. Conboy,* 459 U.S. 248, 260-61 (1983). The prosecutor and the Attorney General must balance "the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation," *United States v. Doe,* 465 U.S. 605, 616 (1984), and should confer immunity only if there is a "realistic possibility that [the witness]' answer to a question can be used in any way to convict him of a crime." *Pillsbury, supra,* at 266 n.1 (Marshall, J., concurring). The prosecutor and Attorney General can make this balance effectively only if they are familiar with the facts on both sides of the balancing scale.

> A federal prosecutor does not offer immunity to a suspected criminal unless he expects to obtain important testimony that would not otherwise be available. The prosecutor realizes that, in almost all cases, an offer of immunity — even of use immunity — means sacrificing the chance to prosecute the witness for his own role in the criminal enterprise.

Pillsbury Co. v. Conboy, supra, 459 U.S. at 288 (Stevens, J., dissenting). If immunity is granted, it should be "as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination." *Murphy v. Waterfront Commission,* 378 U.S. 52, 107 (1964) (White, J., concurring).

Insofar as the Fifth Amendment is concerned, the consensus seems to be that, in the ordinary run of criminal cases, the only hazards of incrimination that are real and substantial are those which relate to past misdeeds or a continuing course of criminal activity. *See Lefkowitz v. Turley, supra,* 414 U.S. at 77; *Marchetti v. United States, supra,* 390 U.S. at 54; *United States v. Brimberry,* 779 F.2d 1339, 1346 (8th Cir. 1985); *United States v. Black,* 776 F.2d 1321, 1326-27 (6th Cir. 1985); *United States v. Quatermain, Drax, supra,* 613 F.2d at 42; *United States v. Phipps,* 600 F. Supp. 830, 831-32 (D. Md. 1985); *United States v. Caron,* 551 F. Supp. 662, 671 (E.D. Va. 1982), *aff'd without opinion,* 722 F.2d 739 (4th Cir. 1983), *cert. denied,* 465 U.S. 1103 (1984).

I agree with the district court that Miron's testimony that he met Castellano on one occasion in connection with a legitimate business transaction between Miron and Castellano's sons could not have been said at the time to create a "real possibility" that it could be used to convict Miron of an uncontemplated, noncontinuing and new prospective crime occurring two years later. However, since the testimony was given under a grant of immunity, it is entitled to Fifth Amendment protection. *Maness*

v. Meyers, 419 U.S. 449, 474-75 (1975 (White, J., concurring). We therefore must decide how all-encompassing and enduring the immunity must be. I do not believe Congress intended that, in a case such as this, the grant should protect against the derivative use of the immunized testimony in connection with any crime, no matter how remote in time and place and unpredictable in nature it might be. *See Pillsbury Co. v. Conboy, supra*, 459 U.S. at 288-89 & nn. 8 & 9 (Stevens dissenting).

Immunity aside, if there is a violation of a grand jury witness' Fifth Amendment rights, that violation occurs at the time the witness testifies. 8 *Wigmore on Evidence* § 2263 at 362-63 (3d ed. 1974). It is at that time that the witness either claims or waives his Fifth Amendment privilege. *Minnesota v. Murphy*, 465 U.S. 420, 428-29 (1984); *Garner v. United States*, 424 U.S. 648, 653-56 (1976). The derivative use of testimony in connection with an unforeseen crime occurring years after a grand jury rises cannot illegitimize testimony that was lawfully secured. I see no reason why a different result should follow a grant of immunity based on a supportable claim of privilege. In short, I agree with Judge Weinstein that "the language in *Kastigar* . . . prohibiting the use of compelled testimony 'in any respect' is not to be taken literally."

If *Kastigar* is a correct interpretation of the congressional intent exhibited in section 6002, I suggest that Congress has gone beyond the requirements of the Fifth Amendment. *See Adams v. Maryland, supra*, 347 U.S. at 181. "The establishment . . . of constitutional rights cannot be accomplished either by congressional action or executive fiat." *Clark v. Board of Educ.*, 374 F.2d 569, 570 (8th Cir. 1967); *see also Counselman v. Hitchcock*, 142 U.S. 547, 585 (1892). This possibility should not be overlooked when considering the question of harmless error.

I find no merit in Miron's contention that he had a contract with the Government which precluded the Government from making any use at any time of the testimony quoted in the appendix. My reading of the record satisfies me that the order of general immunity was granted three months before Miron testified. He had no choice whether to accept it; he was required to testify. This is not the stuff of which contracts are made. This case clearly is distinguishable from those in which promises of immunity or lighter sentence are made in exchange for agreements to plead or cooperate. *E.g., Santobello v. New York*, 404 U.S. 257 (1971). In those cases, the typical contractual requirements of offer and acceptance are present. Here, we have neither.

The district court concluded its reasons for rejecting Miron's motions by elaborating on its factual findings that there were wholly independent, legitimate bases for the granting of Judge Bramwell's 30-day extension order and that Judge Bramwell would have granted the order even though the challenged reference to Miron's grand jury testimony was not included in the application. Like my colleague Judge Winter, I find the district court's reasoning to be most persuasive.

An examination of the legislative history of sections 6002 and 6003 indicates that Congress did not intend that a violation of those sections would result in a *per se* constitutional injury requiring dismissal of the indictment. Congressman Richard Poff, Vice-Chairman of the National Commission for Reform of the Federal Criminal Laws and co-author of the proposed legislation, described the statutory provisions as a "use restriction similar to the exclusionary rule." *Hearings on H.R. 11157 and H.R. 12041 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. at 30 (1969). Will Wilson, Assistant Attorney General, Criminal Division, Department of Justice, testified that "under the proposal the possibility of criminal prosecution based upon independent evidence remains

open." *Id.* at 40. Citing *United States v. Blue,* 384 U.S. 251 (1966), as authority, Professor Robert G. Dixon of the National Law Center of George Washington University, and Consultant to the National Commission for Reform of the Federal Criminal Laws, testified that the remedy for violation of the proposed law would be suppression of tainted evidence, not dismissal of the indictment. *Id.* at 57, 63-64.

This is the type of case that permits application of the harmless error rule. *See United States v. Hasting,* 461 U.S. 499, 507-12 (1983); *United States v. Gregory,* 730 F.2d 692, 698 (11th Cir. 1984), *cert. denied,* 469 U.S. 1208 (1985); *United States v. Beery,* 678 F.2d 856, 863 (10th Cir. 1982); *United States v. Shelton,* 669 F.2d 446, 464 & n.32 (7th Cir.), *cert. denied,* 456 U.S. 934 (1982). If, in fact, we are dealing with only the violation of a statute, not of the Fifth Amendment, the harmless error rule is particularly applicable. *United States v. Shelton, supra,* 669 F.2d at 464 n.32.

The district court found that the use of Miron's testimony had "no effect at all on events"; that, instead, it was like "a leaf dropping unobserved in a deep forest" and Miron was "left in precisely the same position as if he had never testified." This finding of no taint was not clearly erroneous and should be accepted by this Court. *See United States v. Lipkis,* 770 F.2d 1447, 1450 (9th Cir. 1985); *United States v. Rogers,* 722 F.2d 557, 560 (9th Cir. 1983), *cert. denied,* 469 U.S. 835 (1984); *United States v. Provenzano,* 620 F.2d 985, 1005 (3d Cir.), *cert. denied,* 449 U.S. 899 (1980); *United States v. Romano,* 583 F.2d 1, 7 (1st Cir. 1978); *United States v. Jones,* 542 F.2d 186, 199 (4th Cir.), *cert. denied,* 426 U.S. 922 (1976). I agree with the district court that the 30-day extension order would have been granted in any event and the evidence uncovered thereby would have been presented to the jury exactly as it was.

As stated at the outset, I also agree with Judge Winter that the judgment of the district court should be affirmed.

EXHIBIT A

Q Do you know a man by the name of Paul Castellano?

* * * * *

A Yes, I do.
Q When did you meet Castellano?
A About a year or two ago.
Q Who introduced you to him?
A John Cody.
Q And what were the circumstances of that introduction?
A His sons were building homes.
Q Whose sons?
A Mr. Castellano's sons were building homes in Staten Island that we were supplying. He wanted to meet me to see if I was giving him the right prices for the materials delivered and that was the extent of the conversation.
Q Where did the meeting take place?
A One of the restaurants in New York.
Q What restaurant?
A I don't remember. I really don't remember what restaurant it was.
Q Who was present at the meeting?
A Mr. Castellano, myself and John Cody.
Q And was this a luncheon meeting?
A I don't know whether it was a luncheon. I really don't remember.
Q How long did it take?
A Maybe an hour, an hour and a half.

* * * * *

Q You said you supplied two of his sons; is that correct?

A Yes.

Q What were their names?

A Joe Castellano and Paul Castellano.

Q Both of them built homes on Staten Island, also?

A Uh huh.

Q What services did you or your companies provide to them?

A I sold them all building materials, lumber and brick, lumber, Portland Cement, such as that, whatever we handle.

Q Was there any — withdrawn.

After Mr. Cody introduced you to Mr. Castellano and you had this initial meeting with him, as you say, to find out whether or not you were giving his son the correct prices, was that it?

A That's what he wanted to be sure of, that I wasn't overcharging.

Q Had there been an accusation that you were overcharging him.

A He felt that my prices were high.

Q And as a result of that meeting, did you change any of your prices?

A No, sir.

Q Did this meeting come before or after you had started to supply one or both of his sons?

A The meeting came after supplying the sons.

Q After supplying both of them?

A Yes.

Q So there was an outstanding bill for both sons; is that correct?

A Well, the sons, their bills were okay. They were paid.

Q They were paid?

A They were paying regularly.

Q They were paying?

A Yes.

Q And what was Mr. Castellano's specific complaint, that the bills were too high?

A No. He thought that the prices were high at that time.

Q The prices for the lumber?

A Yes.

Q And what did you say to him?

A I told him it was the best prices I could sell them at for the quality and the species I supplied.

Q What was the area of the total bill for both sons?

A I would have to get that, I have got thousands of accounts. I do not monitor them myself. I am not a bookkeeper.

Q Was anything else discussed at this meeting other than the specific discussion about your prices for the sons' materials?

A Right, that's all.

Q Was anything else discussed at all?

A That's all.

Q Absolutely nothing else?

A Absolutely nothing.

ALTIMARI, *Circuit Judge,* dissenting:

Today the court sanctions under the harmless error rule the government's use of evidence derived from a defendant's prior immunized grand jury testimony. Because such use of tainted evidence in a criminal prosecution of a defendant violates the federal immunity statute, 18 U.S.C. §§ 6002-03, and the self-incrimination clause of the fifth amendment, I respectfully dissent.

BACKGROUND

As the majority relates, in 1980, defendant Miron, head of a number of building supply companies in the New York metro-

politan area, was compelled to testify as a witness before a grand jury investigating former labor official John Cody and his ties to organized crime. In exchange for his compelled testimony, Miron was given a general grant of immunity pursuant to 18 U.S.C. § 6003. Miron testified before the grand jury about his relationship with Cody and Cody's relationship with Paul Castellano, who was then the reputed leader of the Gambino organized crime family. Although Miron did not testify against Cody at the 1982 trial which resulted in Cody's conviction for labor racketeering, Miron's prior grand jury testimony that Cody and Castellano were in contact concerning the prices to be charged for various building materials did corroborate other information provided by FBI informants as to the Cody-Castellano relationship.

By 1983, the Brooklyn Strike Force's investigation into the activities of Castellano had led them to Castellano's home on Staten Island. The government previously had obtained a series of wiretap orders authorizing the interception of conversations relating to violations of the RICO conspiracy statute — specifically regarding predicate acts of loansharking, extortion and murder. When the FBI was finally able to gain access to the Castellano residence to install an eavesdropping device, the intercepted conversations revealed that Castellano and his cohorts also were involved in labor racketeering.

The government promptly applied to Judge Bramwell for an extention and expansion of the wiretap order to include labor racketeering. The FBI deponent noted in his affidavit that he had learned as early as 1982 that the Gambino family was "engaged in labor racketeering and the corrupt control of labor unions." 671 F. Supp. 124, 126 (E.D.N.Y. 1987). He explained that the Gambino family's participation in labor racketeering took the form of "supply[ing] 'muscle' . . . for corrupt union officials [who] in turn extort money . . . from construction company contractors . . . for labor peace." *Id.*

To establish the connection between Castellano, labor officials and construction company contractors, the FBI agent cited two reliable informants who revealed that Cody was closely associated with Castellano in the activities for which the former was convicted in 1982, and *directly* referred to Miron's immunized grand jury testimony indicating that Castellano, Cody and Miron met to work out prices for building materials. *Id.* at 126-27. As further evidence to support the government's assertion that there was probable cause to believe labor racketeering discussions were being held at the Castellano residence, the FBI deponent reported the results of physical surveillance and previously authorized electronic surveillance of the Castellano residence. Physical surveillance revealed repeated observations of automobiles registered to Local 282 officials and, on two occasions (March 24, 1983 and April 2, 1983), of an automobile registered to defendant Miron. Electronic surveillance revealed, among other things, that Miron had called Castellano to make an appointment to see him on March 24, 1983. *Id.* at 128.

On April 8, 1983, based upon the FBI agent's affidavit, Judge Bramwell authorized a wiretap to cover labor racketeering. The April 8, 1983 wiretap order led to the interception of conversations at the Castellano residence implicating defendant, Castellano and others in an illegal labor payoff scheme. The 1981-83 scheme involved payments to Castellano and Miron by a company which was awarded a multi-million dollar contract to restore Mobil Oil Corporation's deep water terminal and pipeline facility at Port Mobil, New York. The payments were made to get a pipeline welders' union to look the other way while the company hired outside non-union workers at lower wages. The intercepted conversations authorized pursuant to the April 8, 1983 order — characterized by the district court as "devastatingly incriminatory" — resulted in defendant's subsequent indictment, prosecution and conviction for labor racketeering. *Id.* at 129.

DISCUSSION

The majority concedes that the government used defendant's immunized grand jury testimony in violation of the fifth amendment to obtain the wiretap authorization that provided the evidence to convict him of labor racketeering. Nevertheless, the majority concludes that because there were "'wholly independent legitimate sources'" for the granting of the April 8, 1983 extension order, (A5) (quoting 671 F. Supp. at 136), and because the government's use of Miron's immunized testimony was "'of no . . . significance,'" (A5) (quoting 671 F. Supp. at 137), the violation of Miron's statutory and constitutional rights does not require dismissal of the indictment. I disagree.

The federal immunity statute provides that "no testimony or other information compelled . . . (or any information directly or indirectly *derived* from such testimony or other information) may be *used* against the [defendant] in *any* criminal case." 18 U.S.C. § 6002 (emphasis added). The government must show that all the evidence that it uses against a defendant is "*derived* from . . . legitimate source[s] *wholly* independent of the compelled testimony." *Kastigar v. United States*, 406 U.S. 441, 460 (1972) (emphasis added); *see In re Sealed Case*, 791 F.2d 179, 181-82 (D.C. Cir.) (Scalia, *J.*) (all evidence government seeks to introduce against immunized defendant must be "untainted"), *cert. denied*, 107 S. Ct. 331 (1986).

At both the pre- and post-trial hearings concerning defendant's motion to dismiss the indictment, the district court recognized that it was "clearly a violation of the immunity granted to use" Miron's prior grand jury testimony and that the government "shouldn't have done it." In the court's judgment, however, "such use was not in and of itself dispositive," 671 F. Supp. at 137, unless the effect of that use was to create a "substantial" and "real" risk of incrimination. Since the district

court found that Judge Bramwell would have granted the April 8, 1983 extension order even without the benefit of Miron's testimony, the improper use of that testimony by the government was, according to the court, of "no constitutional significance if it had no effect at all on events." 671 F. Supp. at 137.

Judge Weinstein believed, and the majority apparently accepts, that a "de minimus" use of compelled testimony does not "taint" what is derived therefrom. I am unwilling to accept the proposition that a "de minimus" violation of the fifth amendment is "inconsequential."

In 1980, Miron was given general "use" immunity to testify before a grand jury investigating organized crime's control over labor unions in the construction industry about his ties to Cody and Castellano. Seven years later, Miron was convicted, *inter alia*, of a RICO conspiracy involving his participation as an "associate" in the Gambino family enterprise and the conduct of that enterprise through a pattern of criminal activity consisting of labor racketeering. *See* 18 U.S.C. § 1962(d). I fully agree with Judge Winter, Part I *ante*, that Miron's post-immunization activities were part of a "continuing course of . . . criminal activity." *United States v. Quatermain*, 613 F.2d 38, 42 (3d Cir.), *cert. denied*, 446 U.S. 954 (1980).[1] Consequently, once Miron was given blanket immunity

[1] With regard to the alternative grounds advanced by the district court summarized in paragraphs 5 and 6 of Judge Van Graafeiland's concurring opinion, I cannot agree that Miron was not "confronted by substantial and 'real' . . . hazards of incrimination." *Marchetti v. United States*, 390 U.S. 39, 53 (1968) (citations omitted). While I can understand my colleague's reluctance to provide Miron with an "immunity bath," (A22) (citation omitted), insulating him from prosecution "for a career of crime about to be launched," *United States v. Freed*, 401 U.S. 601, 607 (1971), the "risk of incrimination [Miron] faced when forced to testify [before the grand jury in 1980] sufficiently encompassed the activity for which he was ultimately convicted." Appellant's Brief at 20. It is undoubtedly true that at the time Miron was given immunity for his testimony he could not have "contemplated the particular crimes of which he was convicted." (A21). Nevertheless, Miron's post-immunization activities were part of a continuing course of criminal conduct. *Quatermain*, 613 F.2d at

under 18 U.S.C. § 6003 for his testimony concerning activities relating to a continuing course of criminal conduct, I believe the protections afforded by the self-incrimination clause of the fifth amendment required the government to demonstrate that *all* the evidence it offered against Miron at trial was "derived from legitimate independent sources." *See Kastigar*, 406 U.S. at 461-62 (immunity statute is "coextensive with the privilege" against self-incrimination); *accord Pillsbury Co. v. Conboy*, 459 U.S. 248, 254-55 (1983); *United States v. Apfelbaum*, 445 U.S. 115, 122-23 (1980); *see also* H.R. Rep. No. 1549, 91st Cong., 2d Sess. 42, *reprinted in* 1970 U.S. Code Cong. & Admin. News 4007, 4017. This the government could not do since practically all the evidence offered against defendant was derived from the FBI agent's affidavit including the reference to Miron's immunized testimony.

The government's unlawful use of defendant's grand jury testimony cannot be saved by the majority's invocation of the harmless error rule. Neither the Supreme Court nor this Court,

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42; *see United States v. Apfelbaum*, 445 U.S. 115, 129 (1980), which Judge Van Graafeiland concedes satisfies the *Marchetti* "substantial" and "real" hazard of incrimination test. *See* 390 U.S. at 53-54 (rejecting "rigid chronological" premise that fifth amendment privilege is entirely inapplicable to prospective criminal acts in favor of standard considering substantiality of risk of incrimination).

In support of its determination that the Port Mobil pipeline scheme involved future acts not encompassed by Miron's immunity, the district court noted that "[a]lthough the indictment dates 1967 as the beginning of the Gambino Family RICO conspiracy, it charges that Miron *joined* the RICO conspiracy only in or after January 1981." 671 F. Supp. at 137. The threat of incrimination was no less "real" or "substantial" because the government subsequently *alleged* that Miron's criminal participation commenced after the date of his grand jury testimony. The assertion of a constitutional privilege cannot depend on the government's choice of dates in an indictment. Although few things about RICO are clear, the statute surely is one aimed at continuing criminal conduct. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985); *United States v. Turkette*, 452 U.S. 576, 583 (1981); *United States v. Benevento*, 836 F.2d 60, 72 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2035 (1988); *United States v. Persico*, 832 F.2d 705, 713-14 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 1996 (1988).

until now, has ever held that the harmless error rule applies when, as in this case, there is a violation of the privilege against self-incrimination. *Cf. United States v. Mariani*, 851 F.2d 595, 600-01 (2d Cir. 1988) (upholding conviction based upon evidence derived from sources independent of immunized testimony *and* where there was no direct or indirect use made of that testimony); *United States v. Nemes*, 555 F.2d 51, 54 n.3 (2d Cir. 1977) ("[i]f the indictment had been obtained by direct or derivative use of immunized testimony, it would have been subject to dismissal"); *United States v. Kurzer*, 534 F.2d 511, 515 (2d Cir. 1976) (dismissal of indictment was not required because it was "uncontested that none of the testimony or information given by [defendant] while immunized was itself used in obtaining his indictment"). The majority's reliance on the Supreme Court's recent decision in *Murray v. United States*, 108 S.Ct. 2529 (1988) is misplaced. The *Murray* holding is merely another example of the Supreme Court's attempts to limit the reach of the exclusionary rule in the fourth amendment context — a holding which the majority concedes is of limited relevance in the fifth amendment context. *Cf. Kurzer*, 534 F.2d at 516 ("[t]he Fifth Amendment, in contrast, is *by its terms* an exclusionary rule") (emphasis added). In any event, it is difficult to understand how the government's error in this case can be deemed harmless when in fact all of the "devastatingly incriminatory" evidence offered against Miron at trial was derived from the unlawful use of his immunized testimony.

Finally, I fear that the majority's acquiescence to the government's use of immunized testimony in this case will have serious implications for the future. The federal immunity statute, consistent with the privilege against self-incrimination, allows the government to compel the testimony of a witness by granting "use" immunity in exchange for that testimony. This "bargain" ensures that the fifth amendment privilege is

preserved. *See Apfelbaum*, 445 U.S. at 130; *see also Braswell v. United States*, 108 S. Ct. 2284, 2294-95 (1988) (noting "serious consequences" that entail when government decides to grant "use" immunity since government must show in any subsequent prosecution that all evidence sought to be introduced was derived from legitimate independent sources). If, however, the government is allowed to violate the "bargain" by using immunized testimony — no matter how innocent, inadvertent or unwitting that use might be, *cf. Santobello v. New York*, 404 U.S. 257, 262 (1971) — the constitutional privilege will have been sacrificed. As a practical matter, this means that witnesses granted "use" immunity in the future will think twice about testifying truthfully (or at all) rather than run the risk that the government will later be able to use the "immunized" testimony against them. Absent enforcement of the "very substantial protection" afforded by the federal immunity statute against compulsory self-incrimination, *Kastigar*, 406 U.S. at 461, both law enforcement and the constitutional rights of immunized witnesses will most assuredly be impaired.

CONCLUSION

In my judgment, the government's use of defendant's prior immunized testimony was a violation of the federal immunity statute and the fifth amendment and necessarily tainted whatever evidence was derived from that use. The fact that Miron's testimony had "no effect" on Judge Bramwell's decision to approve the April 8, 1983 wiretap is irrelevant. What is relevant is that Miron was convicted using tainted evidence in violation of the fifth amendment. Accordingly, because I would reverse the defendant's conviction and dismiss the indictment, I respectfully dissent.

APPENDIX B

UNITED STATES of America, Plaintiff,

v.

Joseph N. GALLO, Julius Miron, et al., Defendants.

No. CR-86-452(S).

United States District Court,
E.D. New York.
Aug. 7, 1987.

WEINSTEIN, Chief Judge:

Defendant Julius Miron has been found guilty by a jury of conspiracy to participate in the Gambino Crime Family through a pattern of racketeering activity, consisting of Taft-Hartley violations and obstruction of justice. He was also found guilty on separate non-RICO Taft-Hartley and obstruction of justice counts.

Miron had been indicted along with fifteen codefendants in an action entitled *United States v. Gallo, et al.*, 668 F.Supp. 736 (E.D.N.Y.1987). *See United States v. Gallo*, 653 F.Supp. 320 (E.D.N.Y.1986); *United States v. Gallo*, 654 F.Supp. 463 (E.D.N.Y.1987). He was tried along with two codefendants for part of the labor union aspects of the conspiracy in the first of several severed trials.

Before trial Miron moved to dismiss the indictment against him on the ground that the government had improperly used, and would use, some of his prior immunized grand jury testimony in violation of 18 U.S.C. § 6002. At a pretrial hearing, the motion was denied. When the evidence of the government was introduced at the trial, the basis for both the defendant's

and the government's contentions became clearer. Accordingly, following Miron's conviction, the court reopened the hearing. Additional evidence and the entire record of the trial were considered. *See United States v. Hossbach*, 518 F.Supp. 759, 771-72 (E.D.Pa. 1980) (court can more readily determine if government met its burden of showing independent sources after presentation of all trial evidence).

The law is cognizant of the importance of the privilege against self-incrimination, and of the need scrupulously to fulfill governmental promises of immunity. Yet, for the reasons indicated below, granting the defendant's motion, and with it the motion for the acquittal which would then logically be required, would consitute a preversion of the immunity statute. Immunization does not provide a warrant to commit new crimes.

I. FACTS

In 1979, Miron, a successful businessman in the building supply industry, was subpoenaed to testify before a federal grand jury in connection with a criminal investigation of former labor official John Cody. That investigation, and the resultant indictment of Cody, 82-CR-13 (E.D.N.Y.), was conducted by the Department of Justice Organized Crime Strike Force in the Eastern District of New York, under the supervision of Special Attorney Michael Guadagno. The government was advised that Miron would invoke his Fifth Amendment privilege against self-incrimination before the grand jury. It applied for an order of immunity. On March 12, 1980, Judge Henry Bramwell granted the order.

On June 18, 1980, Miron testified before the grand jury pursuant to the grant of statutory immunity. 18 U.S.C. § 6002. The government questioned Miron about his relationship with John Cody and Teamsters' Local 282, about Cody's relation-

ship with Paul Castellano, a leader of the Gambino Crime Family, and about a 1978 meeting set up by Cody at which Castellano, Miron and Cody settled a dispute over the price of materials Miron had supplied for homes being built by Castellano's sons. Miron's Grand Jury Testimony, *United States v. John Doe* (U.S. v. Cody). June 18, 1980.

In 1986 Castellano was named as an unindicted coconspirator of Miron and two other labor union officials, Louis Giardina and George Daly. That is the case now before us.

In the 1982 criminal litigation Cody was convicted of labor racketeering. Miron did not testify at that trial. Special Attorney Guadagno provided Miron's grand jury testimony to the probation officer who prepared Cody's presentence report. That report specifically referred to Miron's immunized testimony and the links it established between Cody and Castellano. Cody Presentence Report, 82-CR-13(S), at 11-12. The report indicated that Miron's testimony regarding the Miron-Castellano-Cody dispute resolution "corroborated" information provided by FBI informants as to the Cody-Castellano relationship.

At about the time of Cody's sentencing, the government initiated a series of applications for orders authorizing the placement of electronic bugs in the home of Paul Castellano. In its November 12, 1982 application for such an order, the government submitted an affidavit by FBI agent Joseph O'Brien, alleging probable cause to believe that discussions were ongoing in the Castellano residence concerning violations of the RICO conspiracy law — in particular, regarding loansharking, extortion, and murder. O'Brien did not contend that there was probable cause to believe that any labor racketeering or Taft-Hartley violations discussions would take place. Miron was not named as a person whom the government expected to intercept. Judge Bramwell signed the first interception order on November 12, 1982. Because the FBI was unable to gain

immediate entrance to the Castellano home, the government repeated its application on three occasions prior to April 1983. Judge McLaughlin authorized the interception on December 23, 1982 and again on January 28, 1983. Judge Bramwell once again signed an order on March 7, 1983. There appears no doubt that all these orders were supported by ample evidence.

The FBI was finally able to enter the Castellano residence to install the eavesdropping device on March 23, 1983. During the first week or so of intercepted conversations, the FBI overheard discussions concerning labor matters, including possible violations of the Taft-Hartley and Hobbs Acts. On April 8, 1983, Agent O'Brien applied to Judge Bramwell for a renewal of the order. In his accompanying affidavit, O'Brien included new information indicating probable cause to believe that labor racketeering was being discussed, and requested an expansion of the order to cover Taft-Hartley and Hobbs Act violations. The material information that O'Brien added to support expansion to labor activities is set out at length below. The particular aspects relating to Miron are italicized. As is indicated in the discussion that follows at Section II C, *infra*, an important issue is whether information about Miron's grand Jury testimony was significant in the decision of the authorizing judge to expand the order.

"INFORMATION CONCERNING
LABOR RACKETEERING

"12. I [Agent O'Brien] . . . noted in my affidavit of November 12, 1982, that I have learned that the Gambino Family is engaged in labor racketeering and the corrupt control of labor unions. However, I did not contend on any of my previous affidavits that there was probable cause to believe

that the subjects would have discussions at the subject premises concerning labor racketeering in general, and in particular Hobbs Act and Taft-Hartley violations. On the basis of what I have learned from what has already been intercepted at the subject premises and the other information submitted herewith and in my previous affidavits, I submit that there is probable cause to believe that the subjects are also discussing labor racketeering violations at the subject premises.

"13. In connection with my assignment to this case, I have had conversations with several FBI agents who have extensive experience in the area of labor racketeering and, in particular, racketeering in the construction industry. Based on these conversations, especially with Special Agent James Brennan (who was assigned for three years to the FBI's LILREX investigation which resulted in the convictions of over 15 people in connection with labor racketeering in the construction industry) and my own experience and investigations, and information supplied to other agents by confidential informants, I have learned that the criminal activities in which members of the Gambino Family engage in the area of labor racketeering take many forms. Among those illegal activities are violations of the Hobbs Act and Taft-Hartley Act. In such situations, members of the Gambino Family usually supply 'muscle' or support for corrupt union officials. These union officials in turn extort money (or other things of value) from construction company contractors or other employers in the construction industry for labor peace (a commitment not to strike or create other labor problems) and in the case of non-unionized firms, for the right to employ non-union labor, usually at lower wages or fewer benefits. The corrupt union officials, of course, are required to split their payoffs with Gambino Family figures. In some situations, members of the Family or their close associates are actually union officials themselves. In others, members of the Family control companies in the construction industry and

make payoffs themselves to labor officials in violation of the Taft-Hartley Act. Finally, there also exist situations where corrupt union officials accept payoffs from employers who have not actually been extorted in violation of the Taft-Hartley Act and share those payoffs with Family members.

"14. One labor official closely associated with the Gambino Family, and in particular with Paul Castellano, is John Cody, the President of Local 282 of the International Brotherhood of Teamsters, the local representing employees for companies primarily responsible for delivering materials and supplies to construction sites in the New York Metropolitan area. Mr. Cody was convicted in the United States District Court (USDC) for the Eastern District of New York (EDNY) in October, 1982, on RICO charges arising out of his extortionate practices and receipt of Taft-Hartley payoffs in connection with his operation of the union. The FBI has received information from two reliable informants that Cody was closely associated with Carlo Gambino, Castellano's predecessor, as head of the Family, and is now closely associated with Castellano in the conduct of his criminal activities.

"15. In connection with Cody's sentencing, federal prosecutors submitted to Judge Jacob Mishler a sentencing memorandum in which they stated:

Since Cody assumed power with Local 282, he has been known by the Federal Bureau of Investigation and other law enforcement agencies as a close associate of several high-ranking organized crime figures. Informant information which has been corroborated by physical surveillance and Cody's own admissions to FBI agents established a close relationship between Cody and both Carlo Gambino and Ettore Zappi.

After Gambino's death, Cody became associated with Paul Castellano, who succeeded Gambino as head of that organized crime family.

"16. In addition, the probation report contained information to the effect that Cody was closely linked to Paul Castellano.

"17. Significantly, despite the emphasis which the government placed on Cody's ties to Castellano and Cody's opportunity to challenge the government's contention concerning his links to Castellano and the Gambino Family, Cody did not take issue with them.

"18. *I am also informed by Special Attorney Michael Guadagno of the Organized Crime Strike Force in the EDNY that during his investigation of the Cody case, he heard testimony from Julie Miron, the President of Miron Mason Supplies. Mr. Miron said that he had supplied materials for the construction for homes Castellano's sons were building on Staten Island. A dispute arose over the price Mr. Miron was charging for the materials. Mr. Miron was then contacted by John Cody on behalf of Castellano. Cody said that he thought Mr. Miron's prices for the Castellano materials were too high. Cody then arranged a meeting which Paul Castellano, Cody, and Miron attended to discuss this dispute.*

"19. I am also informed by Special Agent Patrick Marshall that on the afternoon of March 1, 1983, at Fay and Allen's Restaurant, 1240 Third Avenue, New York, New York, he observed Paul Castellano and Thomas Bilotti in the company of Anthony Salerno, one of the most powerful members of the Genovese Organized Crime Family, Vincent Di Napoli, an uppon echelon member of the Genovese Family, and another man. Marshall approached the five men and greeted them. The man Marshall did not recognize identified himself as Al Mosca.

"20. I am informed by Special Agent James Brennan that Vincent Di Napoli was convicted in the United States District

Court for the Eastern District of New York on RICO charges arising out of the LILREX investigation. The investigation established that Di Napoli, through his position in the Genovese Family, his association with other powerful organized crime figures, and his corrupt relationship with labor union officials, in particular, Theodore Maritas of the Carpenters Union, was at the heart of a corrupt extortion scheme which dominated a large segment of the construction industry. Indeed, Agent Brennan characterizes Di Napoli a[s] one of the most powerful organized crime labor racketeers in the New York area. Maritas, who was Napoli's co-defendant in the RICO case disappeared shortly before he was scheduled to stand trial. His wallet was found on the shore of the Long Island Sound. Significantly, Di Napoli's May 1, 1983, meeting with Castellano and Bilotti took place on the day before he was to report to prison to begin his five year prison term on RICO charges.

"21. A reliable confidential informant referred to as 'J' in my March 7, 1983 affidavit has reported that Al Mosca is associated with the Glenwood Concrete Company of New Jersey.

* * *

"ADDITIONAL INFORMATION FROM CONFIDENTIAL INFORMANTS

"26. Informant 'J', previously identified in my affidavit of March 7, 1983, has reported in the past week that Paul Castellano continues to meet at his home with several members of the heirarchy of the Gambino Family, including Thomas Bilotti, James Failla, Pasquale Conte, and other prominent Family members, including Robert DiBernardo, Frank DiCicco, Joe Corrao, and Salvatore Barbato. In particular 'J' reported that the meetings often concern the Gambino Family's

interests in the concrete and construction industries and labor union matters in those industries, particularly matters concerning Local 282 of the Teamsters. 'J' also reported that Robert DiBernardo is currently attempting to assert influence over Bobby Sasso, the Secretary-Treasurer of Local 282 and the expected successor to John Cody.

* * *

"THE RESULTS OF PHYSICAL SURVEILLANCES

"31. [Extensive affidavit information about physical surveillance of the Castallano home, including repeated observations of automobiles connected to labor unions and their officials, including those of Teamsters Local 282 and Mason Tenders Union Local 23. *See* paragraphs 31(f), 31(*l*), 31(n).]

"31. (*g*) *On March 24, 1983, at 4:32 PM a car registered to Mr. Julie Miron (referred to above in connection with John Cody) was observed at the Castellano home*. In addition, I received information from informant 'J' referred to in my initial affidavit that on the afternoon of March 24, 1983, that Al Mosca (previously referred to above in connection with Vincent DiNapoli) was also present at the Castellano home.

"31. (*o*) On April 2, 1983, James Failla's car was seen at the Castellano home at 10:31 AM. Salvatore Barbato's car was seen there at 11:58 PM. Frank De Cicco's car was seen there at 12:10 PM. James Failla's car was seen there at 12:27 PM. *At 3:09 PM cars known to be used by* Failla, Barbato, De Cicco, and *Mr. Julie Miron were seen at the Castellano home*. Salvatore Barbato's car was seen there at 4:25 PM.

"RESULTS OF ELECTRONIC SURVEILLANCE

"32. Electronic surveillance was commenced pursuant to this court's order of March 7, 1983, on March 23, 1983. . . . [The subjects] are having conversations about loansharking and labor racketeering violations.

"33. On March 24, 1983, at approximately 12:30 PM, Paul Castellano was overheard. Cars used by Thomas Bilotti and Salvatore Barbato were seen at the time parked outside Castellano's home. In addition, as reported above, an informant reported that Al Mosca was also present in the home. Bilotti is a principal and vice-president of Scara-Mix Concrete Company, based on Staten Island, and of which Castellano's son, Philip is president. Barbato is a shop steward at Scara-Mix and a representative of Local 282 of the Teamsters. The conversation intercepted here includes statements made by Paul Castellano. It also apparently includes statements made by Mosca, Bilotti and Barbato. The topic of the coversation was Local 282. Bobby Sasso, the Secretary-Treasurer of the Local, was mentioned. Also a person was overheard saying that someone should get a 'message to Cody,' presumably John Cody, the president of Local 282. In addition, the conversation appears to concern Castellano's desire to maintain the Gambino Family's long standing control of Local 282, despite Cody's impending imprisonment. Sasso is in line to take over Cody's position should Cody be unsuccessful on his appeal which is curently pending in the Second Circuit Court of Appeals.

"34. *On March 24, 1983, at approximately 5:45 PM, a person arrived in a chauffeur driven limousine. Our investigation reveals that the limousine is used by Mr. Julie Miron, the owner of a large lumber and building supply business. An earlier interception revealed that a person had telephonically contacted Castellano earlier in the day using the name 'Mr. Hennessey,' an apparent code name for Mr. Miron. 'Mr. Hen-*

nessey' made an appointment to meet with Castellano at his home at 5:45 PM. The conversation which Miron and Castellano had was basically inaudible, but there was a reference to surveillances, presumably the surveillances the FBI is conducting in connection with this case, and in the states of New Jersey and Pennsylvania.

"35. On March 25, 1983, at approximately 11:45 AM, a person believed to be Mario Mastromarino of Westfield, New Jersey, met with Castellano. Informant 'J' identified Mastromarino as Castellano's guest. In addition, a car parked at the house was registered to Mastromarino. They were overheard discussing labor problems in connection with the Housebreakers Union in New Jersey. Castellano and Mastromarino agreed that it was hard to tell what was going on, because they have to be very cautious with people. They were overheard mentioning the FBI and the name 'Gotti,' a possible reference to Gambino captain John Gotti. In addition, Mastromarino mentioned that he is receiving 1 million in 100 dollar bills.

* * *

"40(a) On March 30, 1983, a conversation involving Paul Castellano, James Failla, and a third man was intercepted between approximately 11:00 AM and 1:20 PM. It appears that the third man was Louis Giardina, a member of the Genovese Crime Family and also a business agent in Local 23 of the Mason Tenders Union. I submit that Giardina was the participant in the conversation because one of the participants was called Lou by either Castellano or Failla. In addition, a car registered to Local 23 of the Mason Tenders Union was parked at Castellano's home during the time of the conversation and that car is believed to have been driven by Giardina. In the conversation, it appears that Castellano, Failla, and Giardina are discussing a union related problem at a job site. Phrases such as 'had a good thing,' and 'in our territory' were used. They were also overheard discussing Local 37 and saying

that when someone tried to take it over, that two people were killed in the process. Also someone was overheard saying that somebody wants 200 dollars a day per man at the job site and we only want 50 dollars a day.

"(b) Reference was also made to Danny Pagano, a former business agent for Local 59 of the Laborers Union in the Bronx, who was convicted in connection with the LILREX investigation and received a two year prison term in connection with labor racketeering activities.

"(c) Later in the conversation, these men were overheard discussing their belief that the foreman and the shop steward at a job site may have been making 'their own bets.' Either Giardina or Failla said that 'they really don't need his permission to book.'

"(d) Towards the end of the conversation, there was a definite mention of 'the Vario crew' in context of having some past relationship with Giardina and his local. The Vario crew is a reference to Paul Vario and his criminal associates. Cooperating witness Henry Hill reports that he was a close associate of Vario's for over 20 years, that Paul Vario is a capo in the Luchese Organized Crime Family, and that Vario engages in criminal activities in the construction industry and in connection with various Carpenters Locals."

The affidavit also included references to other, more oblique conversations which may have concerned labor matters, e.g., paragraphs 39(b), 39(g), and further surveillances and conversations of persons with labor connections, e.g., paragraphs 31(k), 31(p), 31(q), 39(a), 41, 42.

Judge Bramwell approved the renewal order, with the expansion to cover labor matters. It is apparent that (1) any judge of this court would have taken the same action, and that (2) the absence of the Miron references would have made no difference in the result. In terms of the order actually obtained, the immunized testimony of Miron had no impact at all.

The fruits of the Castellano physical and electronic surveillance were used to procure the 1986 indictment in this case. They constituted a substantial portion of the proof at trial against Miron.

The bug revealed that Miron, Castellano, Daly and Giardina had shared substantial sums obtained from Robert Peter Matthews, President of Matthews Industrial Piping. Matthews had in late 1981 obtained from the Mobil Oil Company a multimillion dollar contract to install pipelines in a new oil tank farm in Staten Island. He made the payments in 1981 and 1982 to get Daly's union of welders and pipefitters to look the other way while he brought in out-of-state welders in place of Daly's union's members. When a junior union official balked and insisted that Matthews hire local union welders, Matthews threatened to reveal the payoffs to the authorities. The taped conversation in 1983 of Miron and his fellow criminals, dealing with this emergency, along with the testimony of Matthews and documentary evidence, produced devastatingly incriminatory evidence against Miron and his cohorts.

Miron himself did not testify at his own trial and his compelled 1980 grand jury testimony was not introduced. He challenges the indictment and his conviction, on the theory that his grand jury testimony was used by Agent O'Brien to demonstrate the probable cause precipitating the Castellano bug, the fruits of which led to Miron's subsequent indictment and conviction. He contends that the use of his compelled testimony to secure evidence later used against him is *per se* prohibited by the Fifth Amendment proscription against self-incrimination.

The Circumstances of O'Brien's Affidavit

Agent O'Brien testified at the hearings on this matter. His testimony, and that of other government witnesses, was candid

and fully credible. O'Brien decided to apply for the expansion to labor matters after hearing the labor conversations in the interceptions obtained on March 24, 1983. At some point in the next two weeks, most likely on April 4th, *see* Hearing Transcript of May 19, 1987, at 90 (hereinafter May 19th Tr.), O'Brien approached Strike Force Attorney-in-Charge Edward McDonald for assistance in preparation of the renewal and expansion affidavit. O'Brien told McDonald about the surveillances and intercepted conversations, and asked for further information that would corroborate probable cause for the labor expansion. Because the conversations had referred extensively to Cody, McDonald gave O'Brien the information from Cody's presentence report and sentencing memorandum, which became the basis for paragraphs 15-17 of O'Brien's affidavit. (March 4th Tr. at 23; May 28th Tr. at 8-11; May 19th Tr. at 80-81.) McDonald dictated to O'Brien the language from the presentence report related in paragraph 15 of the affidavit. (May 18th Tr. at 8.) O'Brien had earlier obtained the information about the Cody-Castellano connection, in particular the FBI informant information included in paragraph 13, from FBI Special Agent James Brennan. (May 18th Tr. at 6, 15.)

O'Brien also mentioned to McDonald that Miron had been seen entering the Castellano residence. From his knowledge of the prior Cody case, McDonald immediately associated Miron with Cody, and told O'Brien to speak with Attorney Guadagno about that possible connection. (March 24th Tr. at 14-15; May 18th Tr. at 24; May 19th Tr. at 89-90.) Guadagno subsequently told O'Brien about Miron's testimony concerning the 1978 Castellano-Cody-Miron conference. (March 4th Tr. at 19-20). This information became the basis of paragraph 18. Neither McDonald or Guadagno mentioned to O'Brien that Miron's testimony had been given pursuant to a grant of immunity. (March 4th Tr. at 10, 15, 19-20.) McDonald does not recall whether he had remembered that immunity had been

granted. (May 19th Tr. at 81.) O'Brien did not learn that the information may have come from immunized testimony until after the present motion was filed. (March 4th Tr. at 22.) O'Brien did not tell Guadagno anything about the reasons for his inquiry, or about Title III applications or affidavits; he merely said that McDonald had referred him to Guadagno to elicit information concerning labor racketeering, Cody, and Miron. (March 4th Tr. at 16; May 19th Tr. at 57-58, 60.)

For the purposes of this motion, the affidavit paragraphs related to labor union activities can be split into three separate categories. The first consists of those paragraphs whose inclusion was in no way a product of Miron's testimony. These include, at the very least, paragraphs 12, 13, 15 except for the final sentence, 19, 20, 21, 26, 31(f), 31(*l*), 31(m), 31(n), 31(*o*) except perhaps for the reference to Miron, 32, 33, 35, 40(a), 40(b), 40(c), and 40(d).

The second category is of those paragraphs which contain information which *may* have been verified in part on the basis of Miron's testimony. This includes paragraphs 14, 16, 17, the last sentence in paragraph 15, and a portion of paragraph 33. It is almost certain that these paragraphs would have been included in the affidavit even if Miron had never testified before the grand jury. They contain information which was obtained from other sufficient sources. Miron's description of his meeting with Cody and Castellano was at most merely corroborative of the extensive and overwhelming evidence that the government had obtained from informants and other sources which resulted in Cody's conviction.

The final category consists of paragraphs 18, 34, and parts of 31(g) and 31(*o*). These portions were derived, at least in part, from Miron's compelled testimony. Paragraph 18 describes the testimony itself. Paragraphs 31(g), 31(*o*), and 34 record Miron's visits with Castellano, visits which conceivably would not have been notable without knowledge of the Miron-Cody-Castellano relationship.

II. LAW

A. *Use Immunity*

The Fifth Amendment privilege against self-incrimination is a "specific provision of which it is pecularily true that 'a page of history is worth a volume of logic.' " *Ullman v. United States*, 350 U.S. 422, 438, 76 S.Ct. 497, 506, 100 L.Ed. 511 (1956) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963 (1921)). The power of government to compel persons to testify in judicial proceedings has a long and venerable pedigree of its own. *See Kastigar v. United States*, 406 U.S. 441, 443-45 & nn. 2-6, 92 S.Ct. 1653, 1655-56 & nn. 2-6, 32 L.Ed.2d 212 (1972). Immunity statutes, with their well-established historical roots in Anglo-American jurisprudence, *see id.* at 445 & n.13, 92 S.Ct. at 1656 & n.13, are "not incompatible" with the values underlying the Fifth Amendment where "they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." *Id.* at 445-46, 92 S.Ct. at 1656-57. In assessing the constitutionality of a grant of immunity, the fundamental inquiry is whether that immunity is "coextensive with the scope of the privilege." *Kastigar*, 406 U.S. at 449, 92 S.Ct. at 1659; *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 54, 84 S.Ct. 1594, 1956, 12 L.Ed.2d 678 (1964); *see also Glickstein v. United States*, 222 U.S. 139, 141, 32 S.Ct. 71, 72, 56 L.Ed.128 (1911) (immunity must be "in all respects commensurate with the protection guaranteed by the constitutional limitation").

In *Counselman v. Hitchcock*, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892), the Supreme Court uttered its initial major pronouncement on the constitutionality of an immunity statute. The Immunity Act of 1868 had provided that no evidence "obtained from a party or witness by means of a judicial proceeding . . . shall be given in evidence, or in any manner

used against him . . . in any court of the United States. . . ." 142 U.S. at 560, 12 S.Ct. at 197. The Court construed the statute as affording protection against the direct use of a witness' testimony in a criminal proceeding against him, and not against other such use to which that testimony might be put which could eventually lead to future criminal penalties. 142 U.S. at 564, 12 S.Ct. at 198-99. Noting that an immunity statute cannot "replace" the constitutional privilege "unless it is so broad as to have the same extent in scope and effect," 142 U.S. at 585, 12 S.Ct. at 206, the Court declared the statute unconstitutional, because it did not fully protect against what has become known as the "derivative use" of the immunized testimony.

At the end of its opinion, the Court stated in passing that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution *for the offense to which the question relates*." 142 U.S. at 586, 12 S.Ct. at 206 (emphasis added for reasons which appear in Section II B, below). In response to this dictum, which was broader than the "derivative use" rationale upon which the Court had based its decision, a new "transactional immunity" bill was enacted as the Compulsory Testimony Act of 1893. That law provided that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise. . . ." Act of Feb. 11, 1893, 27 Stat. 444. This statute became the basis for numerous federal immunity statutes prior to 1970, each granting complete immunity as to any "transaction" about which the witness testified.

In 1970, after "re-examining applicable constitutional principles and the adequacy of existing law," *Kastigar*, 406 U.S. at 452, 92 S.Ct. at 1660, Congress enacted the statute pursuant to which the defendant here was compelled to testify. It pro-

vided for "use" rather than "transactional" immunity, but went further than the provision struck down in *Counselman* by proscribing indirect and derivative use as well. 18 U.S.C. § 6002 reads in part as follows:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States, . . .
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Congress noted that "[t]his statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination." S.Rep. No. 617, 91st Cong., 1st Sess. 145 (1970); H.Rep. No. 1549, 91st Cong., 2d Sess. 42 (1970), U.S. Code Cong. & Admin.News 1970, pp. 4007, 4017.

The Supreme Court upheld the constitutionality of this statute in *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), ruling that "use plus derivative use" immunity was coextensive with the scope of the privilege. 406 U.S. at 458, 92 S.Ct. at 1664. It regarded the *Counselman* language concerning the necessity of "absolute immunity" as

unnecessary to that decision, and thus nonbinding dicta. 406 U.S. at 454-55 & n.39, 92 S.Ct. at 1662 & n.13. Transactional immunity, the Court determined, "affords the witness considerably *broader* protection than does the Fifth Amendment privilege." 406 U.S. at 453, 92 S.Ct. at 1661 (emphasis added).

To ensure that the "use plus derivative use" immunity would be honored, the Court emphasized that "[t]his total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." 406 U.S. at 460, 92 S.Ct. at 1664-65. This comprehensive proscription was to be enforced by imposing a strict burden of proof on the prosecution "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." 406 U.S. at 460, 92 S.Ct. at 1665. The government's affirmative duty of proof is triggered " 'once a defendant demonstrates that he has testified, under a . . . grant of immunity, to matters related to the . . . prosecution. . . .' " *Id.* (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 n.18, 84 S.Ct. 1594, 1609 n. 18, 12 L.Ed.2d 678 (1964)).

The *Kastigar* Court emphasized that the immunity granted must leave the witness " 'in substantially the same position as if the witness had claimed his privilege in the absence of a . . . grant of immunity.' " 406 U.S. at 457, 92 S.Ct. at 1663 (quoting *Murphy*, 378 U.S. at 79, 84 S.Ct. at 1610). This test, which in effect restates the rule that the grant of immunity must be coextensive with the privilege, is the standard by which analysis must proceed.

B. *Subsequent Crime Immunity*

The government contends that we need not decide whether it has met its burden of proving wholly independent legitimate

sources, because Miron could not in the first place have asserted the privilege in order to protect himself against prosecution for crimes committed *subsequent* to the compelled testimony. The defendant opposes any application of a subsequent act doctrine limiting his immunity.

As already noted, Miron's testimony was compelled in June 1980. It related to events which took place in the 1970's. The particular conspiracy crimes and predicate acts for which he was convicted took place between December 1981 and June 1983. Miron's conversations with Castellano were intercepted on March 24, 1983 and June 3, 1983, when Miron's crimes were in their most virulent state. The June 3rd tape was introduced as evidence at the trial, four years later, in 1987.

The immunity statute itself does not make any distinctions based upon the time or nature of the crimes in question, except insofar as it specifically refers to perjury or contumacious conduct. To emphasize, it says, "*no testimony or other information* compelled under the order (or any information *directly or indirectly derived* from such testimony or other information) *may be used against the witness in any criminal case*. . . ." This language was echoed by the court in *Kastigar*, which noted that the immunity law "provides a sweeping proscription of *any* use, direct or indirect, of the compelled testimony and any information derived therefrom." 406 U.S. at 460, 92 S.Ct. at 1664 (emphasis added). The Court stressed that the Fifth Amendment privilege itself "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and . . . therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." 406 U.S. at 453, 92 S.Ct. at 1661 (emphasis added).

Despite its expansive scope, any reading of the statute to provide protection against prosecution for all future crimes would establish an extraordinary anomaly in the law of immunity. It is contrary to the *Counselman* langauge, already em-

phasized *supra,* that restricted the protection to "the offense to which the question relates." 142 U.S. at 586, 12 S.Ct. at 206. If the defendant were correct, the modern "use plus derivative use" immunity approved in *Kastigar* would in an important respect provide far greater protection than the traditional "transactional" immunity, even though the 1970 statute was intended to constrict the scope of immunity to the level actually required by the Fifth Amendment. Congress explicitly instructed that the use immunity statute was meant to provide immunity "as broad as, *but no broader than,* the privilege against self-incrimination." S.Rep. No. 617, 91st Cong., 1st Sess. 145 (1970), H.Rep. No. 1549, 91st Cong., 2d Sess. 42 (1970), U.S. Code Cong. & Admin. News 1970, pp. 4007, 4017 (emphasis added).

Counselman made it clear that the object of the Fifth Amendment was to ensure that a witness not be compelled to give testimony "which might tend to show that he himself *had* committed a crime." 142 U.S. at 562, 12 S.Ct. at 198 (emphasis added). In order to provide protection "to the same extent" as the privilege, an immunity statute, therefore, "must afford absolute immunity against future prosecution *for the offense to which the question relates*." 142 U.S. at 586, 12 S.Ct. at 206 (emphasis added). The transactional immunity statute reflected this basic rule, in that it protected against the use of "any transaction, matter or thing concerning which [the witness] may testify." In each case the reference necessarily is to a past act, since it is only about such an event that testimony can be elicited.

The Supreme Court has repeatedly emphasized the importance of chronology in construing an immunity grant. It has pointed out that under the pre-1970 immunity statute, immunity was intended to apply "only to *past* criminal acts concerning which the witness should be called to testify." *United States v. Bryan,* 339 U.S. 323, 340, 70 S.Ct. 724, 735, 94 L.Ed. 884

(1950) (emphasis in original). It long ago ruled that the constitutional privilege "relates to the past, and does not endow the person who testifies with a license to commit perjury." *Glickstein v. United States*, 222 U.S. 139, 142, 32 S.Ct. 71, 73, 546 L.Ed. 128 (1911). This doctrinal limitation to past crimes remained applicable after the 1970 enactment of 18 U.S.C. § 6002. *See United States v. Wong*, 431 U.S. 174, 97 S.Ct. 1823, 52 L.Ed.2d 231 (1977); *see also United States v. Housand*, 550 F.2d 818, 822 (2d Cir. 1977) (immunity relates to past crimes; perjury is a new crime with respect to which no immunity was conferred), *cert. denied*, 431 U.S. 970, 97 S.Ct. 2931, 53 L.Ed.2d 1066 (1977).

As the Second Circuit has pointed out, the perjury doctrine is not merely the result of the exception included at the end of the immunity statute. That exception is technically superfluous because the perjured testimony, since it is not a past act concerning which the witness is questioned, is not subject to the Fifth Amendment privilege. "[T]he testimony falls outside the constitutional privilege." *United States v. Tramunti*, 500 F.2d 1334, 1342 (2d Cir. 1974), *cert. denied*, 419 U.S. 1079, 95 S.Ct. 667, 42 L.Ed.2d 673 (1974). By lying, the court continued, "the witness commits a *new* crime beyond the scope of the immunity, which was intended to protect him against his past indiscretions." *Id.* (emphasis added). The Court of Appeals concluded that the immunity "does not extend *in futuro*." *Id.* at 1344.

Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968), and subsequent developments are not to the contrary. The defendant in *Marchetti* accrued income through gambling, and was convicted for failing to register to pay a federal occupational tax on wagering. The Court found that Marchetti's registration of his betting would inevitably incriminate him as to his illegal gambling. The statute required the acquisition of a federal gambling tax stamp, which would

in effect declare "a present intent to commence gambling activities." 390 U.S. at 53, 88 S.Ct. at 705. The Court also determined that even without any threat of incrimination for past acts, the statute was nonetheless unconstitutional because of the incrimination as to future acts. It rejected the premise that the privilege is entirely inapplicable to prospective acts, concluding that "[w]e see no warrant for so rigorous a constraint upon the constitutional privilege." *Id.*

Marchetti eschewed the "rigid chronological distinction between past and prospective acts," preferring instead to rely on the "central standard for the privilege's application," namely, "whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Id.* (citing *Rogers v. United States*, 340 U.S. 367, 374, 71 S.Ct. 438, 442, 95 L.Ed. 344 (1951); *Brown v. Walker*, 161 U.S. 591, 600, 16 S.Ct. 644, 648, 40 L.Ed. 819 (1896)). Thus, *Marchetti* concluded, the operative standard is the "substantiality of incrimination," rather than "mere time [of offense]." 390 U.S. at 54, 88 S.Ct. at 705-06.

A "substantial and real" — "trifling and imaginary" distinction is not particularly useful in a case such as the instant one. The Court left undetermined the precise boundary between what were to be considered "substantial" hazards, and what were to be deemed merely "speculative," suggesting only that "prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination." 390 U.S. at 54, 88 S.Ct. at 705.

Post-*Marchetti* cases have drastically constricted the category of prospective offenses which might be considered "substantial" hazards. In *United States v. Freed*, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971), the defendants were indicted for possessing unregistered hand grenades in violation of the National Firearms Act. The Act explicitly barred use of the registration information in prosecution for prior or

concurrent offenses. 401 U.S. at 604, 91 S.Ct. at 1115 (citing 26 U.S.C. § 5848 (1964 ed., Supp. V)). The defendants argued that fingerprints and photographs on the registration would incriminate the transferees "in the future." The Court ruled that those were merely "trifling or imaginary," rather than "substantial and real," "hazards of incrimination." 41 U.S. at 606, 91 S.Ct. at 1116. It explicitly rejected the argument that there exists a "periphery" of the Self-Incrimination Clause "which protects a person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched." The Court refused to allow "such an expansive interpretation" of the Fifth Amendment. 401 U.S. at 606-07, 91 S.Ct. at 1117. *See also id.* at 611, 91 S.Ct. at 1119 (Brennan, J., concurring) (same).

Similarly, the Second Circuit ruled that a declaration under the National Firearms Act of an intention to produce a firearm, "does not simultaneously admit a violation of another section of the . . . Act," in that case a prospective unregistered transfer of the firearms. *DeSimone v. United States*, 423 F.2d 576, 581 (2d Cir.) *cert. denied*, 400 U.S. 842, 91 S.Ct. 84, 28 L.Ed.2d 77 (1970). Even if such an illegal transfer were likely, the court decided, the mere possibility that the defendant or one of his customers "may decide to commit a different criminal act in the future is not enough to support the fifth amendment claim." *Id.* at 581-82. The incrimination there was merely speculative, even if it was statistically or sociologically probable. *Marchetti* was distinguished by the fact that in that case "49 states prohibited the very activity disclosed by payment of the tax," thus constituting a "real hazard of incrimination." *Id.* at 581 (quoting *Varitimos v. United States*, 404 F.2d 1030, 1034 (1st Cir. 1968), *cert. denied*, 395 U.S. 976, 89 S.Ct. 2126, 23 L.Ed.2d 765 (1969)).

Finally, in *United States v. Apfelbaum*, 445 U.S. 115, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980), the Supreme Court reestab-

lished a virtual *per se* exclusion from the scope of the privilege for prospective acts. The issue in *Apfelbaum* was whether *truthful* testimony compelled under a grant of immunity could be introduced as evidence in a subsequent prosecution for false statement committed during that same testimony. In ruling that such testimony was admissible, the Court acknowledged that the perjury "exception" to the privilege is based not on the falsity of the statement, but rather, on the inapplicability of the privilege to acts committed subsequent to the grant of immunity. "A future intention to commit perjury . . . is not by itself sufficient to create a 'substantial and real' hazard that permits invocation of the Fifth Amendment," even as to those portions of the testimony that were not perjurious. 445 U.S. at 131, 100 S.Ct. at 957. The Court explicitly approved *Freed*'s narrowing of *Marchetti*, 445 U.S. at 129-30, 100 S.Ct. at 959, and further distinguished *Marchetti* on the ground that the gambling activities there were "ongoing," rather than merely prospective. 445 U.S. at 129, 100 S.Ct. at 956. *See also United States v. Quatermain*, 613 F.2d. 38, 42 (3d Cir.) (*Marchetti* limited by *Freed*; in *Marchetti*, "future conduct" was part of a "continuing course of similar criminal activity"), *cert. denied*, 446 U.S. 954, 100 S.Ct. 2923, 64 L.Ed.2d 812 (1980). The logical inference extracted from the confluence of *Freed*, *DeSimone* and *Apfelbaum* is that *Marchetti* is limited to those cases where the prospective acts are merely an extension of identical "ongoing" past and present acts. The *Apfelbaum* court concluded that "the Fifth Amendment does not prevent the use of respondent's false swearing because, at the time he was granted immunity, the privilege would not have protected him against false testimony that he later might decide to give." 445 U.S. at 130, 100 S.Ct. at 957.

As the preceeding quotation from *Apfelbaum* makes clear, the focus of the inquiry in determining whether the grant of immunity is "coextensive" with the privilege is the scope of the

protection that the privilege confers. *See also United States v. Quatermain*, 613 F.2d 38, 41 (3d Cir.), *cert. denied*, 446 U.S. 954, 100 S.Ct. 2923, 64 L.Ed.2d 812 (1980). The proper question, then, is not what would have occurred had the witness remained silent pursuant to the privilege, but rather, what the witness may properly have withheld pursuant to the privilege in the first place. To be coextensive with the privilege, the immunity need not "treat the witness as if he had remained silent." It is "analytically incorrect to equate the benefits of remaining silent as a result of invocation of the Fifth Amendment privilege with the protections conferred by the privilege." *Apfelbaum* 445 U.S. at 127, 100 S.Ct. at 955. Thus, the two-part test is that the compelled testimony remains inadmissible in all prosecutions "for offenses [1] committed prior to the grant of immunity that [2] *would have permitted the witness to invoke his Fifth Amendment privilege absent the grant.*" 445 U.S. at 128, 100 S.Ct. at 956 (emphasis added.) This test reiterates the observation of Justice Frankfurter that "the immunity granted need only remove those sanctions which generate the fear justifying invocation of the privilege." *Ullmann v. United States*, 350 U.S. 422, 431, 76 S.Ct. 497, 502, 100 L.Ed. 511 (1956). Section 6002 itself only confers immunity "whenever a witness refuses on the basis of his privilege against self-incrimination, to testify. . . ." If the basis for assertion of the privilege extends only to past acts, the grant of immunity extends no further.

What is clear from more than one-hundred years of experience with immunity provisions is that the language in Kastigar relied on by the defendant, prohibiting the use of compelled testimony "in *any* respect," is not to be taken literally. In *Apfelbaum* the Supreme Court acknowledged that this language was somewhat hyperbolic and inconsistent with the history and logic behind the privilege. 445 U.S. at 120 n.6, 100 S.Ct. at 952 n.6. *See also United States v. Bryan*, 339 U.S. 323, 342,

70 S.Ct. 724, 736, 94 L.Ed. 884 (1950) ("The words 'any criminal proceeding' cannot sensibly or reasonably be construed so literally and generally . . .") (quoting *Edelstein v. United States*, 149 F. 636, 644 (8th Cir. 1906), *cert. denied*, 205 U.S. 543, 27 S.Ct. 791, 51 L.Ed. 922 (1907)).

The privilege against self-incrimination is inapplicable to noncontinuing new prospective crimes. *Cf. United States v. Hossbach*, 518 F.Supp. 759 (E.D.Pa.1980) (where there exists overlapping conspiracies with identical overt acts, immunity may extend to the related future acts). The privilege does not supply "insulation for a career of crime about to be launched." *United States v. Freed*, 401 U.S. 601, 606-07, 91 S.Ct. 1112, 1117, 28 L.Ed.2d 356 (1971). A defendant cannot refuse to testify on the ground that what he now says may incriminate him in a possible crime he may decide to commit in the future. If in fact the grand jury is investigating prior crimes and not the continuing criminality of the person granted immunity, the compelled grand jury testimony should later be directly admissible in proving future criminality. A fortiori, indirect use would also be authorized in such circumstances.

C. *Immateriality of Government Use*

As to those offenses for which the privilege against self-incrimination may properly be invoked, the immunity conferred must leave the witness "in substantially the same [but no better] position as if the witness had claimed his privilege in the absence of a . . . grant of immunity." *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79, 84 S.Ct. 1594, 1610, 12 L.Ed.2d 678 (1964). *See also Kastigar*, 406 U.S. at 462, 92 S.Ct. at 1666; *United States v. Kurzer*, 534 F.2d 511, 516 (2d Cir. 1976). *Cf. Harrison v. United States*, 392 U.S. 219, 224-25, 88 S.Ct. 2008, 2011, 20 L.Ed.2d 1047 (1968) (coerced confessions); *Wong Sun v. United States*, 371 U.S. 471, 487-88,

83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963) (illegal searches). The burden is on the government to prove "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1665. *See also Murphy*, 378 U.S. at 79 n.18, 84 S.Ct. at 1609 n.18. This "heavy burden," 406 U.S. at 461, 92 S.Ct. at 1665, is not satisfied by the prosecution's mere assertion that the immunized testimony was not used. *United States v. Tantalo*, 680 F.2d 903, 908 (2d Cir.1982).

The defendant is entitled to a fair hearing at which the government must make an affirmative showing of its wholly independent legitimate sources. *Id.* We assume, because of the importance of the constitutional right involved, that the burden is either one of "clear and convincing evidence" or "beyond a reasonable doubt." *See United States v. Hossbach*, 518 F.Supp. 759, 772 (E.D.Pa.1980) (clear and convincing evidence). *Cf. Allen v. Illinois*, — U.S. —, 106 S.Ct. 2988, 92 L.ED.2d 296 (1986) (proceedings to have person declared dangerous were not "criminal" for self-incrimination purposes, but did require proof beyond a reasonable doubt); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (for summary judgment motion in libel case, court should be guided by clear and convincing standard in determining whether genuine issue of actual malice exists). *Cf. also United States v. Fatico*, 458 F.Supp. 388 (E.D.N.Y.1978), *aff'd*, 603 F.2d 1053 (2d Cir.1979), *cert. denied*, 444 U.S. 1073, 100 S.Ct. 1018, 62 L.Ed.2d 755 (1980); *but cf. Lego v. Twomey*, 404 U.S. 477, 487 n.15, 92 S.Ct. 619, 625-26 n.15, 30 L.Ed.2d 618 (1972) (distinguishing on other grounds *United States v. Schipani*, 289 F.Supp. 43 (E.D.N.Y.1968), *aff'd*, 414 F.2d 1262 (2d. Cir.1969), *cert. denied*, 397 U.S. 922, 90 S.Ct. 902, 25 L.Ed.2d 102 (1970)).

Even where immunized testimony was in some literal sense "used," that use is of no constitutional significance if it had

no effect at all on events, because it leaves the witness in the same position as if the testimony had never been heard. It is but a leaf dropping unobserved in a deep forest.

United States v. Kurzer, 534 F.2d 511 (2d. Cir. 1976), relied upon by the defendant, is not persuasive authority to the contrary. Kurzer was the accountant of a meat industry magnate, Moe Steinman. In 1973, Kurzer's compelled testimony concerned Steinman's filing of false tax returns. Steinman was indicted on charges of filing false returns and bribery. The government informed Steinman that other company officers, not including Kurzer, had revealed information regarding further false invoice schemes. With the threat of additional serious indictments imminent, Steinman decided to cooperate. He told the government about wholly separate false tax filings in which Kurzer was involved. Kurzer subsequently was indicted for those false filings, which were entirely independent from those about which he had testified. *Id.* at 514. Neither the trial court nor the court of appeals mentioned whether the crimes alleged occurred subsequent or prior to Kurzer's compelled testimony. The courts do not seem to have addressed the issue of whether Kurzer's privilege extended to the crimes for which he was charged. It must be assumed that the court considered them "sufficently interrelated" and continuing to have made incrimination substantial rather than merely speculative.

The court in Kurzer identified the pivotal question as whether Kurzer's testimony "contributed to Steinman's decision to testify." *Id.* at 517. The government would satisfy its "wholly independent source" burden if it could prove that "Steinman would have testified against Kurzer because of the case the Government had developed against him entirely apart from Kurzer's information, even if the prior indictment to which Kurzer's information had contributed never existed." *Id.* Thus, even though Kurzer's immunized testimony was "used" in some

trivial or literal sense, such use was not in and of itself dispositive. The proper inquiry under *Kurzer* is therefore whether the "use" had any tangible *effect* on what subsequently occurred.

III. APPLICATION OF LAW TO FACTS

It is apparent that Miron could not have refused to testify before the 1980 Grand Jury on the ground that more than a year later he might want to enter a conspiracy to take advantage of a criminal opportunity wholly unforeseeable at the time of the testimony. The proof showed that the criminal activity for which he was convicted began after he testified before the grand jury. His testimony was not immunized as to that subsequent crime.

Although the indictment dates 1967 as the beginning of the Gambino Family RICO conspiracy, it charges that Miron *joined* the RICO conpiracy only in or after January 1981. His criminal conduct was directed at a target of opportunity — the construction of the Port Mobil oil tank farm in Staten Island — that emerged in 1981 through 1983. The pipe-welding contractor conspired with Daly, Miron, Giardina and Castellano in a classic payoff-sweetheart deal. The welding contract was not awarded until the late fall of 1981, more than a year after Miron's grand jury testimony. It would have been impossible at the time of his testimony for Miron even to have contemplated the particular crimes for which he was convicted. The immunity agreement could not prevent the government from using the testimony to explore leads to the new crime as it unfolded.

Even if the interpretation of immunity law to exclude future independent crimes grants insufficient protection to those who are granted immunity, so that the testimony in question here was immunized as to the 1983 crimes, no violation of any right of Miron has been shown. It is apparent that even without

that testimony, the government would have acted exactly as it did, and no judge of this court would have deviated in the slightest from the course of granting orders authorizing the bugs that revealed information incriminatory to Miron.

Miron's 1980 grand jury testimony did not affect O'Brien's decision to apply for the labor expansion at the time of the renewal of the Castellano bugging order. The inclusion of information from that testimony in the affidavit did not "contribute" to Judge Bramwell's decision to approve the labor expansion. The wholly independent legitimate sources for both of those pivotal decisions have been proven by the government beyond a reasonable doubt. Miron has been left in precisely the same position as if he had never testified in the *Cody* case.

Given the large number of independent investigating and prosecutorial agencies in the New York metropolitan area, it is next to impossible to completely guard against some indirect leakage of information. No one like Miron, who is granted limited use immunity in a good faith attempt to develop leads as to past criminal acts of third parties, should receive an "immunity bath" as well as an "invisible shield" against prosecution for future crimes, particularly where the defendant's compelled testimony is of absolutely no significance in the prosecution.

IV. CONCLUSION

Defendant Miron's motion to suppress information received from bugs on Castellano's home is denied. The motion to set aside the judgment of conviction is denied.

So ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

FILED: November 21, 1988

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Twenty-first day of November, one thousand nine hundred and Eighty-Eight

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UNITED STATES OF AMERICA,
Appellee,

V

JOSEPH N. GALLO, JOSEPH ARMONE, JOSEPH CORRARO, ROBERT DIBERNARDO, JAMES FAILLA, JOSEPH ZINGARO, THOMAS AGRO, ROBERT DESIMONE, JACK GIARDANO, ANGELO RUGGIERO, ANTHONY VITTA, GEORGE DALY, LOUIS GIARDINA, SALVATORE MILIORISI, JULIE MIRON, MILDRED RUSSO, JULIE MIRON,

DOCKET NO. 87-1379

Defendant,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed hereby by defendant-appellant, Julie Miron.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

By: Fred M. Cassidy,
Chief Deputy Clerk

APPENDIX D

Supreme Court of the United States

No. A-475

Julie Miron,

Petitioner

v.

United States

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 10, 1989.

/s/

Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 13th day of December, 1988.